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February 15, 2006

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: *Petition of Tri-State Brick and Stone of New York, Inc. and Tri-State Transportation Inc. For Declaratory Order*; Finance Docket No. 34824

Dear Sir:

I am enclosing an original and ten copies of the Opposition of the New York City Economic Development Corporation and the City of New York to Petition of Tri-State Brick and Stone of New York, Inc. and Tri-State Transportation Inc. for Declaratory Order in the above referenced proceeding. An additional copy is enclosed for date stamp and return to our messenger. Please note that a 3.5 inch diskette is enclosed with this document.

Thank you for your attention to this matter.

Sincerely,

Alex Menendez

Enclosure

ND: 4838-1957-4784, Ver 1

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 34824
PETITION OF TRI-STATE BRICK AND STONE OF NEW YORK, INC. AND TRI-STATE TRANSPORTATION INC. FOR DECLARATORY ORDER

OPPOSITION OF THE NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION AND THE CITY OF NEW YORK TO PETITION OF TRI-STATE BRICK AND STONE OF NEW YORK, INC. AND TRI-STATE TRANSPORTATION INC. FOR DECLARATORY ORDER

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Dated: February 15, 2006

BEFORE THE
SURFACE TRANSPORTATION BOARD

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PETITION OF TRI-STATE BRICK AND STONE OF NEW YORK, INC. AND TRI-STATE TRANSPORTATION INC. FOR DECLARATORY ORDER

OPPOSITION OF THE NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION AND THE CITY OF NEW YORK TO PETITION OF TRI-STATE BRICK AND STONE OF NEW YORK, INC. AND TRI-STATE TRANSPORTATION INC. FOR DECLARATORY ORDER

The New York City Economic Development Corporation ("EDC") and the City of New York ("NYC") pursuant to the applicable rules of the Surface Transportation Board ("Board") files this opposition to the Petition of Tri-State Brick and Stone of New York, Inc. and Tri-State Transportation Inc. for Declaratory Order ("Petition") and states the following in support thereof:

SUMMARY

Tri-State Brick and Stone of New York, Inc. and Tri-State Transportation Inc. (collectively "Petitioners") began their journey into this proceeding with false assumptions, incorrect statements and erroneous allegations about the acts and intentions of NYC, EDC, and Apple Industrial Development Corp. ("Apple") (collectively the "City").

The logical extension of Petitioners' argument is that any person or business that uses rail service may squat on rail property used for rail service or owned by a railroad without any consequences, and that the land owner has no authority over its own property. This Board cannot sustain an approach to its controlling statute that would have this effect.

Notwithstanding Petitioners' attempts to fabricate a theory for its clams herein, the following summarizes the pertinent facts and legal issues in this proceeding.

- City is not, by Petitioners' own admission, seeking to close or abandon the 65th Street Rail Yard. NYC is attempting to remove Petitioners from its real property.
- Petitioners had the right to occupy this property under an agreement with the former operator of the 65th Street Rail Yard. When that agreement with the former operator expired, so too (by Petitioners' own admission) did Petitioners' rights with respect to this property.
- Petitioners have no lawful right to occupy NYC's property.
- Petitioners are not now and never have been rail common carriers providing transportation subject to the jurisdiction of the Board. As a result, Petitioners' argument that City's action is preempted by applicable Federal Law lacks a key foundation and accordingly must fail.

This case has none of the broad Interstate Commerce Act implications that Petitioners claim. Nor is there an attempt to remove all rail yard services as Petitioners claim. This is simply a case of a property owner attempting to use lawful means to remove an unlawful occupant from its land.

Specifically, NYC is seeking to recover from Petitioner Tri-State Brick and Stone of New York, Inc. ("Tri-State") and Petitioner Tri-State Transportation, Inc. ("Tri-State Transportation") possession of certain real property more particularly described as the 65th Street Rail Yard, which is owned by NYC and located west of 2nd Avenue, proximate to the area from 63rd Street to 65th

Street, Bay Ridge, New York, identified on the Kings County Tax Map as Block 5804, Lot 2, and Block 5806, Lot 2 ("Premises" or "65th Street Rail Yard").[1]

Petitioners commenced an action in the United States District Court for the Southern District of New York styled *Tri-State Brick and Stone of New York Inc., v. New York City Economic Development Corporation et al.*, Civil Action No. 05-7561 ("Federal Court Action") in which they sought, among other things, preliminary injunctive relief attempting to prevent the City from removing the Petitioners from the Premises. In the Federal Court Action, Petitioners argued that: 1) The City is "engaged in a campaign to rid the City-owned land" of rail facilities and eliminate rail for freight transportation; 2) The City is "scrapping the only public freight terminal in Brooklyn after years of development with taxpayer funds"; and 3) The City is seeking to force the abandonment of all common carrier rail service provided to the general public via the 65th Street Rail yard. *See Plaintiffs' Memorandum of Law in Support of a Preliminary and a Permanent Injunction* filed in Federal Court Action, a copy of which is attached as Exhibit A. A hearing was held before the Honorable George B. Daniels on December 6, 2005 and at that hearing the Court denied the Petitioners' request for a preliminary injunction. A copy of the transcript of that hearing is attached hereto as Exhibit B ("Hearing Transcript at p. ___").

In another attempt to prevent NYC from evicting them from the Premises, the Petitioners have now filed this Petition and have made arguments similar to those raised in the Federal Court Action. The Petitioners' allegations have no basis in fact or in law. NYC and EDC plan to

[1] The City also intends to seek, in the appropriate forum, from Petitioners compensation for the fair market value of Petitioners' use and occupancy of the Premises, plus attorney's fees, and the costs and disbursements associated with any proceeding relating to the City's recovery of possession of the Premises.

preserve the rail operations at the 65th Street Rail Yard and are engaged in activities throughout NYC that are designed to improve, not remove, rail service.

Petitioners not only present false statements and false allegations in support of their case, but then surround those allegations with an equally baseless argument that NYC's attempt to remove Petitioners from the Premises is preempted by Federal Law. Petitioners' attempt to wrap themselves in the protective cloak of Federal Law, despite one major flaw - - they are not now and have never been a "common carrier" providing transportation that is subject to the jurisdiction of the Board. In essence, what Petitioners are really arguing is that despite state or local law, rail customers have the unfettered right to occupy property to position themselves to receive rail service. Not surprisingly, Petitioners fail to cite any case law or statutory authority to support this argument.

BACKGROUND FACTS

NYC owns the Premises in fee simple, pursuant to a deed dated April 27, 1981 ("Deed"), by which NYC acquired title to the Premises from the State of New York ("State"). The Deed was recorded on May 6, 1981, at Reel 1234, Page 1101, in the Office of the City Register of the County of Kings. The Premises is a rail yard, which encompasses approximately 33 acres of property. On or about August 28, 2000, EDC, on behalf of NYC, issued a Request for Proposals ("RFP") seeking an entity to operate the Premises. On or about December 20, 2001, Canadian Pacific Railroad ("CP"), and its subsidiary, Delaware and Hudson Railway Company, Inc. ("D&H') (jointly referred to as the "Operator") were awarded the contract to operate the Premises.

The Operating Agreement between Apple and Operator

By an operating agreement, dated as of March 1, 2002 ("Original Operating Agreement"), Apple, as administrator, and CP and D&H, as Operator, agreed that Operator would operate the Premises for a period of three years, ending on the third anniversary of the commencement date of March 1, 2002, unless sooner terminated, or extended by Apple and Operator for up to two annual periods. *See Petition* at Exhibit A. The Original Operating Agreement was amended and restated as of June 1, 2002 to, among other things, increase the acreage to be included within the Premises. (The agreement as amended and restated is hereinafter referred to as the "Operating Agreement.") As of June 1, 2002, the Operating Agreement was the only operating agreement in effect with respect to the Premises. The Operating Agreement explicitly states its purpose:

> [T]he purpose of this Agreement is to grant the right to Operator [Canadian] to conduct and operate such freight operations on a non-exclusive basis for the purpose of promoting the transportation of freight at the Premises and providing equal commercial access to other companies that desire to utilize the rail freight facilities at the Premises....

Pursuant to Section 2.03 of the Operating Agreement, Operator was given the right to manage, direct and control the Premises; "provided that Operator shall not enter into any contracts or other agreements relating to the Premises that extend past the Expiration Date." (Emphasis in original). Section 2.04 of the Operating Agreement provides, that "Operator may not enter into any agreements that permit a third party to use or operate any portion of the Premises (each, an "Ancillary Agreement") for non-Freight Operations purposes except by written consent of Apple, which may be granted at the sole discretion of Apple." Section 2.04 further provides that such Ancillary Agreements "shall be subordinate and subject to the terms and conditions of the [Operating] Agreement."

Ancillary Agreement between Operator and Petitioner Tri-State

Operator entered into an Ancillary Agreement with Petitioner Tri-State for the non-exclusive right to use the loading dock on the Premises and 4.1 acres on the north side of the Premises ("Tri-State Contract Area"), for the purposes of receiving freight by rail, storing brick, and distributing brick by truck ("Tri-State Ancillary Agreement"). *See Petition* at Exhibit B. The term of the Tri-State Ancillary Agreement commenced June 18, 2002, and was to terminate on February 28, 2005, unless sooner terminated in accordance with the provisions of the Tri-State Ancillary Agreement and the Operating Agreement. Despite the express terms of the Operating Agreement, Apple's consent to the Tri State Ancillary Agreement was not requested. Neither the NYC, EDC, nor Apple was a signatory to the Tri-State Ancillary Agreement. Pursuant to the Tri-State Ancillary Agreement, Tri-State agreed, among other things, to pay a base fee to Operator for the use of 4.1 acres of the Tri-State Contract Area. *See Petition* at Exhibit B. The Operating Agreement was incorporated by reference into the Tri-State Ancillary Agreement. *Id.* The Tri-State Ancillary Agreement provided that upon its termination or expiration, Tri-State shall remove all of its installations, alterations or additions, and equipment from the Tri-State Contract Area and quietly yield and surrender it. *Id.*

Operator Voluntarily Relinquished Its Operating Agreement

On July 31, 2004, Operator CP voluntarily agreed to the termination of the Operating Agreement, as it claimed that it could not generate the business it had anticipated. Since the Tri-State Ancillary Agreement was subordinate to the Operating Agreement, the Tri-State Ancillary Agreement terminated on July 31, 2004, the date that the Operating Agreement was terminated. In any event, the Tri-State Ancillary Agreement would have expired, by its terms, on February 28, 2005. Rather than vacate the Tri-State Contract Area, as required by the Tri-State Ancillary

Agreement, Tri-State remains there without NYC's permission. In fact, Tri-State is now using an additional approximately 1.4 acres of the Premises to, among other things, warehouse bricks and other materials. The approximately 1.4 acres not covered by the Tri-State Ancillary Agreement is hereinafter referred to as the "Tri-State Non-Contract Area."

The Board should deny Petitioners' request for a declaratory order because by their own admission in the facts they present, Petitioners are not rail carriers. Prior decisions from this Board confirm that the activities in which Petitioners are engaged do not constitute rail transportation that is subject to this Board's jurisdiction. As a result, the umbrella of federal preemption does not block NYC from exercising its rights under state law to evict this unlawful occupant from its land and to recover the fair market value of its occupation to date. In the alternative, if the Board concludes that further proceedings are necessary, NYC and EDC respectfully request that the Board establish an expedited schedule for further evidentiary submission and argument, with expedited resolution of the matter.

ARGUMENT

I. The Board does not have jurisdiction in this matter because the Petitioners are not common carriers providing transportation that is subject to the jurisdiction of the Board.

The Board should deny the Petition. No proceeding is required here, and this Board's precedent confirms that Petitioners are not entitled to the relief they seek. Petitioners have not shown – and cannot show – that the Board's governing statute preempts state law in this matter.

The Board has exclusive jurisdiction over "transportation by rail carrier" and its regulation of rail carriers preempts state regulation with respect to rail transportation. Interstate Commerce Commission Termination Act ("ICCTA"), Pub. L. No. 104-88, 109 Stat. 803 (1995),

codified at 49 U.S.C. § 10501(b). The ICCTA defines a "rail carrier" as a "person providing common carrier railroad transportation for compensation. "49 U.S.C. § 10102(5).[2] Based on the ICCTA and applicable case law, the City's attempt to remove Petitioners from the Premises is not preempted by the ICCTA because the Petitioners are not "common carriers" providing transportation that is subject to the jurisdiction of the Board. Petitioners assert that the Premises are subject to the exclusive authority of the Board. However, because Petitioners are shippers and not common carriers, the Board has no jurisdiction over the Petition.

a. The *Hi Tech Trans, LLC et al. v. State of New Jersey* decision controls the issues presented in the instant action.

In fact, this Board and the 3rd Circuit have recently disposed of a similar claim by a shipper. The decision in *Hi Tech Trans, LLC et al. v. State of New Jersey et al.*, 382 F.3d 295 (3rd Cir. 2004) ("*Hi Tech Trans, LLC*") is dispositive of Petitioners' claims and confirms that the Board does not have jurisdiction over the parties' dispute.

In *Hi Tech Trans, LLC*, the appellant, Hi Tech Trans ("Hi Tech") operated a solid waste disposal facility in Newark, New Jersey. *Id.* at p. 295. Hi Tech sought declaratory relief to prevent continuation of an administrative enforcement proceeding that the New Jersey Department of Environmental Protection ("NJDEP") brought against it. Hi Tech argued that any action by NJDEP was preempted because Hi Tech's solid waste disposal facility involved transportation by railroad and was therefore subject to the exclusive jurisdiction of the STB. *Id.* The district court did not address the preemption argument but rather invoked the doctrine of

[2] 49 U.S.C. § 10901 and the Board's regulations establish the formal procedures that must be followed to obtain the Board's authorization to act as a rail carrier. On information and belief, Petitioners have neither sought nor received such authorization.

abstention and dismissed the complaint. *Id.* The Third Circuit in affirming the district court addressed Hi Tech's preemption argument. *Id.*

Hi Tech had a principal place of business located in a rail yard in Newark, New Jersey ("Rail Yard"). *Id.* at 298. Hi Tech entered into a license agreement with CP in which it "agreed to develop and operate a construction and demolition debris bulk waste loading facility" at the Rail Yard. *Id.* The License Agreement limited Hi Tech to using the premises in the Rail Yard only for the transfer of Waste Products from truck to railcars operated by CP. *Id.* at 299. Hi Tech termed the facility in the Rail Yard a "Transload Facility". *Id.* Trucks were to haul construction and demolition debris waste to the Transload Facility. *Id.* The trucks would discharge the construction and demolition debris into a hopper that Hi Tech provided there. *Id.* Then the construction and demolition debris were loaded directly into rail cars from the hoppers. *Id.* Once the rail cars were filled, the construction and demolition debris were transported to out-of-state disposal facilities. *Id.*

Hi Tech claimed that it was subject to the exclusive jurisdiction of the STB because its facility fell under the ICCTA's definitions of "transportation" and "railroad." *Id* at 306. Hi Tech argued that "because it falls under both definitions, its facility is subject to the STB's exclusive jurisdiction" and New Jersey's "regulations are preempted as applied to it." *Id.* Specifically, Hi Tech argued as follows:

> Hi Tech operates a "railroad" insofar as it operates intermodal equipment used by or in connection with a railroad and operates a terminal facility and yard and ground used for transportation. Hi Tech provides "transportation" insofar as it provides a yard, property, facility and equipment related to the movement of property by rail and services relating to that movement. When taken together, Hi Tech's facility and activity fall directly within the definitions set forth in the ICCTA and the regulations thereof by state and local authorities is expressly preempted. Thus, the STB, by virtue of its exclusive jurisdiction over transportation by

> rail carriers, has exclusive jurisdiction over Hi Tech and its regulation preempts state law.

Id. at 306 *citing* Hi Tech's Br. at 18-19. The Court rejected this argument, noting the following:

> Even if we assume *arguendo* that Hi Tech's facility falls within the statutory definition of "transportation" and/or "railroad," the facility still satisfies only a part of the equation. The STB has exclusive jurisdiction over "*transportation* by rail carrier." *49 U.S.C. § 10501(a), (b)* (emphasis added). However, the most cursory analysis of Hi Tech's operations reveals that its facility does not involve "transportation by rail carrier." The most it involves is transportation "*to* rail carrier." Trucks bring C&D debris from construction sites to Hi Tech's facility where the debris is dumped into Hi Tech's hoppers. Hi Tech then "transloads" the C&D debris from its hoppers into rail cars owned and operated by CPR, the railroad. It is CPR that then *transports* the C&D debris "by rail" to out of state disposal facilities. As we noted above, Hi Tech operates its facility under a License Agreement with CPR. Pursuant to the terms of that license agreement, Hi Tech is permitted to use a portion of CPR's OIRY for transloading. Hi Tech is responsible for constructing and maintaining the facility and CPR disclaims any liability for Hi Tech's operations. License Agreement, PP 4(d), 7. Thus, the License Agreement essentially eliminates CPR's involvement in, and responsibility for, the operation of Hi Tech's facility. Hi Tech does not claim that there is any agency or employment relationship between it and CPR or that CPR sets or charges a fee to those who bring C&D debris to Hi Tech's transloading facility.

Id. Based on this rationale the Court concluded that:

> Hi Tech simply uses CPR's property to load C&D debris into/onto CPR's railcars. The mere fact that the CPR ultimately uses rail cars to transport the C&D debris Hi Tech loads does not morph Hi Tech's activities into "transportation by rail carrier." Indeed, if Hi Tech's reasoning is accepted, any non-rail carrier's operations would come under the exclusive jurisdiction of the STB if, at some point in a chain of distribution, it handles products that are eventually shipped by rail by a rail carrier. The district court could not accept the argument that Congress intended the exclusive jurisdiction of the STB to sweep that broadly, and neither can we.

Id. at 309. The court in *Hi Tech Trans, LLC also* cited to the district court's reasoning *vis a vis* the preemption argument. The district court had stated:

> While the federal interest in regulating interstate railroads is indeed strong, the federal interest in this case is vitiated at least in part by the unprecedented claim of Hi Tech to be treated as a "railroad," when it is in fact a solid waste transfer station operating pursuant to a license from a railroad.

Id. The Court went on to state that it agreed with the district court's assessment that Hi Tech's preemption claim was "meritless." *Id.*

Lastly, the court in *Hi Tech Trans, LLC* referenced this Board's rejection of a petition Hi Tech had filed with the STB relying on substantially the same preemption arguments. *See Hi Tech Trans, LLC - Petition for Declaratory Order*, STB Finance Docket No. 34192 (Sub-No. 1) (Served August 14, 2003) ("*Hi Tech Trans, LLC - Petition for Declaratory Order*"). This Board concluded:

> In sum, Hi Tech's activities at its transloading facility at CP's Oak Island Yard and related activities are not part of "transportation by rail carrier" as defined under 49 U.S.C. § 10501(a). Hi Tech is merely using CP's property to transload cargo. Thus, the Board does not have jurisdiction over those activities, and section 10501(b) preemption does not apply to the state and local regulations at issue here.

Id. at 310.

The Court's rationale in *Hi Tech Trans, LLC* and the STB's rationale in *Hi Tech Trans, LLC - Petition for Declaratory Order* fully dispose of Petitioners' argument here. Like Hi Tech, Petitioners here argue that they operate a "railroad" because they operate in a terminal facility and yard that is used for rail transportation. Also, like Hi Tech, Petitioners argue that they provide "transportation" insofar as they provide "a yard, property, facility and equipment related to the movement of property by rail and services relating to that movement." Like Hi Tech, Petitioners here cannot succeed because, like Hi Tech, Petitioners are not rail carriers.

As stated above, pursuant to the Original Operating Agreement, CP provided rail service on the Premises. CP and Petitioner Tri-State then entered into the Tri-State Ancillary Agreement

for the purposes of receiving freight by rail, storing brick, and distributing brick by truck. In other words, under the Tri-State Ancillary Agreement, Petitioner Tri-State had a non-exclusive right to run a transloading operation. *Petition* at Declaration of Robert J. Turzilli at ¶ 7. Petitioner Tri-State Transportation, which also does not provide rail service, entered into an agreement with Tri-State to provide all transloading and storage services on the Premises. As Petitioners themselves assert, Tri-State Transportation "engages only in receiving freight in rail cars, unloading freight and loading it onto common carrier or consignee's trucks which deliver it to consignees as provided in the bills of lading." *Petition* at p. 5. The controlling facts are as follows:

- In this matter, as in *Hi Tech Trans, LLC*, Petitioners have never obtained the Board's authorization to act as a rail carrier. *See 49 U.S.C. § 10901*[3];
- In this matter, as in *Hi Tech Trans, LLC*, Petitioners simply used the Premises for services that did not constitute "transportation by rail carrier", *i.e.* to receive shipments of brick, to store bricks and distribute brick by truck.
- In this matter, as in *Hi Tech Trans, LLC*, Petitioners entered into and operated in the Premises pursuant to an agreement with a railroad, CP.[4] ;
- In this matter, as in *Hi Tech Trans, LLC*, the terms of the agreement permitted Petitioners to use a portion of the premises for transloading;

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[3] The City is not suggesting that the act of filing the proper documents with the STB would confer rail carrier status on the Petitioners. If Petitioners were to file such documents, the decision in *Hi Tech Trans, LLC Petition for Declaratory Order* would support the dismissal of any proceeding at the Board.

[4] As noted by the Court in *Hi Tech Trans, LLC*, the fact that Hi Tech entered into an agreement with a rail carrier cannot confer railroad carrier status on Petitioners for regulatory purposes. *Hi Tech Trans, LLC*, 382 F.3rd at 308 n. 18. The agreement does, however, serve to demonstrate the nature of Petitioners' activities and its relationship to CP.

- In this matter, as in *Hi Tech Trans, LLC*, the terms of the agreement left Petitioners responsible for maintaining the Premises;
- In this matter, as in *Hi Tech Trans, LLC*, pursuant to the terms of the agreement CP Railroad disclaimed any liability for Petitioners' operations.
- In this matter, similar to *Hi Tech Trans, LLC*, where the Court found that Hi Tech's operations were separate and distinct from the railroad's operations, Petitioners are responsible for their own electricity, maintenance of sanitation facilities, drinking water, office trailer and security;
- In this matter, as in *Hi Tech Trans, LLC*, the controlling agreement essentially eliminated CP's involvement in, and responsibility for, the operation of Petitioners' facility.

As the court in *Hi Tech Trans, LLC* reasoned, these activities do not morph Petitioners' activities into transportation by rail carrier. Petitioners' activities on the Premises are not part of "transportation by rail carrier" as defined under 49 U.S.C. § 10501(a). The Petitioners, like Hi Tech, initially were operating in a rail yard subject to an agreement[5] and are involved in "transportation to a rail carrier" not "transportation by a rail carrier." Consequently, the Board does not have jurisdiction over Petitioners' activities in this case, and federal preemption does not apply to preclude NYC from removing Petitioners from the Premises.

[5] An important distinction that militates against Petitioners in this case is that the Operating Agreement in this matter was terminated by CP and the Tri-State Ancillary Agreement has terminated by its own terms on February 28, 2005.

b. Petitioners fail to cite precedent that supports their arguments in the instant action.

Notwithstanding *Hi-Tech*, Petitioners argue that Petitioner Tri-State Transportation is a common carrier providing service subject to the jurisdiction of the Board because it is "handling product for Tri-State Brick's customers and other brick and stone merchants and customers." *Petition* at 12, note 2. In support of this contention Petitioner relies on a series of cases all of which are distinguishable.

Petitioners cite the case of *United States v. Louisiana P&R,* 234 U.S. 1 (1914) ("*Tap Line Case*") in support of their argument that federal preemption applies. S*ee Petition* at 14. Petitioners' reliance on the *Tap Line Case* is misplaced. In that case, the Supreme Court held that railway companies were common carriers because they were engaged in actions that constitute railroad operations (emphasis added). *Tap Line Case*, 234 U.S. at 28-29. These activities included, but were not limited to, the loading of logs on logging trains and switching them over the logging spurs to connect with a rail line. *Id.* at 2. At that point the materials were hauled to mills on the logging trains. *Id.* Furthermore, railway companies were treated and dealt with as common carriers by connecting systems of other carriers. *Id.*

In the instant action, neither Petitioner is a railway company and neither engages in any type of rail operations. They do not move rail cars, throw switches and reposition trains or operate locomotives. In fact, the Petitioners admit that Tri-State Transportation, the entity which they claim is a common carrier providing transportation subject to the jurisdiction of the Board, "engages only in receiving freight in rail cars, unloading that freight and loading it into trucks dispatched by or for the cargo owners at the Yard." *Petition* at 5. In other words, like *Hi-Tech*, Petitioners simply operate a transload facility and do not engage in railroad operations. *Tap Line Case.*

Additionally, Petitioners argue that "the Second Circuit has found that services identical to those provided by Transportation at the Yard are within the definition of rail transportation contained in the act." *Petition* at 11. In support of this point, Petitioners cite *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638 (2nd Cir. 2005). However, in *Green Mountain* the Plaintiff was a rail carrier building a transload facility on its own property in Vermont (emphasis added). *Id.* at 639. The State argued that the construction of the facilities was subject to permitting requirements under state environmental statutes. *Id.* The Second Circuit found that the permit requirements were preempted because they unduly interfere with interstate commerce and it could be time consuming to allow a local body to delay the construction of railroad facilities. *Id* at 643-644. In the instant action, Petitioners are not railroads and are not constructing railroad facilities. Moreover, the Second Circuit in *Green Mountain* did not address, consider or hold that a non-railroad's transload operations constitute rail transportation subject to the jurisdiction of the Board. In other words, *Green Mountain* is simply not germane to the issue presented in this matter.

Petitioners also cite *Association of P&C Dock Longshoremen v. The Pittsburgh and Conneaut Dock Company, et al*, F.D. No. 13363 (Sub-No.1), 8 I.C.C. 280, 1992 WL 30836 (I.C.C. 1992) ("*P&C Dock*"), claiming that "it dealt with a non railroad operating a dock on which it handled product for railroad's customers." *Petition* at 11. Once again, Petitioners' cited precedent fails to support their argument. *P&C Dock* involved the contention of the P&C Dock Longshoreman that it did not conduct rail operations so that *New York Dock*[6] protective benefits would not apply to dock employees. However, the Interstate Commerce Commission held that

[6] *New York Dock Railway--Control--Brooklyn E.D.T. R. Co.*, 360 I.C.C. 60 (1979), *aff'd*, 609 F.2d 83 (2nd Cir. 1981).

P&C Dock Longshoreman conducted rail operations because they: 1) moved rail cars on the track; 2) threw switches and repositioned entire cuts of trains; 3) periodically switched and moved individual cars into certain cuts of trains; 4) they moved and positioned rail cars by locomotives; and 5) repositioned misplaced "empties." *P&C Dock, supra.* As demonstrated above, the Petitioners do not perform any of these functions nor any other function that can be classified as railroad operations that would characterize them as common carriers providing transportation subject to the jurisdiction of the Board.

In another attempt to argue that Tri-State Transportation is a common carrier subject to the jurisdiction of the Board, the Petitioners cite *United States v. Brooklyn Eastern Dist. Terminal*, 249 U.S. 296 (1919). Once again Petitioners' reliance on this case is misguided. That case focused on whether a navigation corporation was a common carrier subject to the Hours of Service Act. *Id.* at 297. The Supreme Court stated that the determination was fact driven. In other words, it looked to what the navigation corporation did. The navigation corporation there engaged in contracts with railroads regarding the receipt and delivery of freight, it owned the tracks at issue and it transported freight in its locomotives and placed freight in cars on its team tracks. *Id* at 301. Furthermore, it also switched rail cars carrying outgoing freight and loaded them using its locomotives on floats and transported the freight in tug boats. *Id.* In the instant action, Petitioners do not have a contract with any railroads, they do not own any tracks, they do not operate locomotives and they do not transport freight in railcars.

None of the cases cited by Petitioners support their contention that Tri-State Transportation is a common carrier providing transportation subject to the jurisdiction of the Board. The cases cited by Petitioners either involved railroads, entities that owned tracks and facilities, or entities that were performing rail services and conducting rail operations. None of

these scenarios are applicable to the Petitioners. Moreover Petitioners' counsel's own statements in the Federal Court Action confirm this. In response to a question by the court, counsel stated the following:

> THE COURT: This isn't an issue about access. This is an issue about, I guess the best way I could characterize it is a lease agreement. You are renting space. You are saying that you should have the right to rent and occupy that space. That's not a question of access. Access is a question of whether you come in and get out. What you are here saying is they cannot evict you because you have a rental agreement to occupy that space.
>
> MR. MCHUGH: We actually have simply an occupancy agreement, your Honor. It is not a lease per se.
>
> THE COURT: Right
>
> MR. MCHUGH: We have no real estate interest in that property. Our right is only to be there, to do what is necessary to unload the railroad cars and put the stuff on trucks. The elements of that, because the railroad cars are much bigger than the trucks, the property has to be unloaded from the railroad cars, put on the ground, picked up from the ground, and put on trucks. Now that is all we have the right to do there. We do not own the property, we do not have a lease on the property, and we do not have an exclusive use to the property. We have only the right to access the railroad via that property, for which we are paying a small fee simply to pay for the fact that the property has to sit there for a while, which would be the same fee we would pay a railroad in a warehouse. It's exclusively access. We are not talking about a lease here. We are talking about the right to get to the railroad.

Hearing Transcript at pp. 7-8 (emphasis added). This admission of the limited operations of the Petitioners and minimal activity at the Premises demonstrates that under the applicable case law and statutory authority, Petitioners are not common carriers providing transportation subject to the jurisdiction of the Board.

II. The City is not seeking to obstruct any rail common carrier's fulfillment of its obligations *vis a vis* the Premises.

The fatal flaw to Petitioners' argument that the City is obstructing the ability of the rail common carrier to fulfill its obligations, is that neither Petitioner is a rail common carrier. The

rail common carrier here is NY&A, and the rail carriers own statements belie the Petitioners' assertions that NYC is obstructing rail access to the Premises.

In the declaration filed with the Petition, NY&A's President states as follows:

> NY&A has no intention of abandoning service to Tri-State, and the **City has never advised NY&A that it intends to seek the abandonment of rail service at the 65th Street Yard**.

Petition at Declaration of Fred L. Krebs ¶ 10 (emphasis added). NY&A's own statement demonstrates that the Petitioners' contentions are false. The City is not seeking to force the abandonment of any rail service or seeking to terminate the use of the Premises as a public freight terminal.

However, NYC may remove a non-rail carrier from property that entity is unlawfully occupying under state law. In late July 2004, CP voluntarily terminated the Original Operating Agreement, which had the effect of terminating the Tri-State Ancillary Agreement. Even if CP's action had not terminated Petitioners' purported right to occupy the Premises, the Tri-State Ancillary Agreement terminated by its own terms on February 28, 2005. As a result, Petitioners, entities that are not common carriers and not providing transportation subject to the Board's jurisdiction, are unlawfully occupying property owned by NYC. There is no agreement between Petitioners and the City for the use of the Premises and the City has never accepted monies from Petitioners in connection therewith. Petitioners have been using NYC's premises without paying use and occupancy since August 2004.

Moreover, the facts, as acknowledged by the Petitioners, demonstrate that the City is not trying to abandon "all rail service" on the Premises. As the Petitioners admit, NY&A is the rail carrier currently providing services at the Premises. *Petition* at p 2. The City has not in any way attempted to limit the service provided by NY&A. Once Petitioners' false statements about their

own activities and regulatory status are removed, and once the allegations about the City's conduct and intent are confirmed to be baseless, the foundation of Petitioners' preemption argument crumbles. With that gone, it is clear that Petitioners are improperly attempting to invoke federal preemption and use it as a shield against a legitimate action by NYC as property owner.

Not only is there no statutory authority to invoke the Board's jurisdiction for that purpose, the Petitioners have previously acknowledged that there was no authority that supports that position. At the Federal Court Hearing, counsel for the Petitioners stated:

> THE COURT: That also raises the issue of standing. Maybe you can tell me, but my understanding is that those rights are usually asserted by the common carrier. They are not rights asserted by the common carrier's customers. You want to assert as a common carrier those rights that you say are provided to the common carrier when I don't have the common carrier here as a plaintiff.
>
> MR. MCHUGH: Your Honor, that is not correct. Under the *Lonestar* case, a customer of a common carrier has a federal right to service. The federal right to service, essentially this is an enforceable agreement. Basically, this clause here is what a customer can enforce. A customer is entitled to service, and if a railroad enters into an agreement –
>
> THE COURT: Enforce it against whom?
>
> MR. McHUGH: It can demand service from the railroad.
>
> THE COURT: Right from the common carrier.
>
> MR. McHUGH: It can demand service from the common carrier.
>
> THE COURT: Do you have any case where the customer has demanded to enforce rights against some other entity other that the common carrier?
>
> MR. McHUGH: I have no case that has that as the law of the case. I have case law in the *Orange County* case that says a land owner cannot obstruct. There are cases where a land owner cannot unilaterally under state law revoke a railroad's right, and the most important case is right here. It is the New York Cross Harbor case, which EDC was the plaintiff, where the EDC attempted to evict, basically to adversely abandon the New York Cross Harbor Railroad because its lease had expired and it was a bad actor. The Surface Transportation Board granted them the approval of that, but the D.C. Circuit reversed that saying you cannot actively abandon a railroad that has active service.

THE COURT: But they are enforcing the rights of the railroad.

MR. McHUGH: Enforcing the rights of the railroad.

THE COURT: Not the railroads customer.

Hearing Transcript at pp. 24-26. The court in the Federal Court Action recognized the problematic nature of the Petitioners' position. The Petitioners are arguing that as a customer of a common carrier they are entitled to service. However, here, as in the Federal Court, they are not demanding service from the railroad, they are demanding a right to occupy property from the owner. Petitioners admit that the common carrier, NY&A is not being denied the ability to serve the Premises.

As referenced in the excerpt cited above from the Federal Court Action, Petitioners argue that *Orange County Transportation Authority, et al. – Acquisition Exemption – The Atchison Topeka and Santa Fe Railway Company*, F.D. No. 32173 (Service Date - March 12, 1997) ("*Orange County*") stands for the proposition that a land owner cannot evict a customer of a common carrier from rail facilities.

Nowhere in *Orange County* did the Board make such a finding. *Orange County* involved a petition filed by five transportation agencies requesting an exemption from 49 U.S.C. Subtitle IV relating to the acquisition of six active railroad lines. The I.C.C. granted that exemption because regulation was not necessary to carry out the transportation policy of section 1010a, the transaction was of limited scope and that regulation is not necessary to protect shippers from abuse of market power. *Id.* In doing so the Board stated that the agencies had the obligation to not interfere with the provision of rail freight service by the carrier. *Id.* (emphasis added). In the instant action, the City is not interfering with NY&A's ability to provide freight service. The City is not obstructing the railroad's operations at the Premises. NYC is, however,

seeking to remove an unlawful occupant from its property and the Petitioners admittedly have cited no authority that supports their argument that the Board's preemptive jurisdiction prevents NYC from exercising these rights.

III. Petitioners should not be allowed to use the Board's jurisdiction as a shield from the legitimate processes of state law

This Board's decisions, confirmed by appellate courts, have confirmed repeatedly that the protection of federal preemption applies only to rail carriers providing transportation subject to the Board's jurisdiction. Where those criteria are not met, and are not triggered by federal preemption, applicable state laws govern. Here, Petitioners do not meet those criteria.

Petitioners state that by developing the terminal on the 65th Street Rail Yard and then entering into an Operating Agreement and commencing rail service, the City undertook obligations to the public, including to the Petitioners, imposed by federal law to continue to afford the common carrier serving the facilities the use required by the nature of the service. Whether or not that statement has foundation in fact or law, it has no relevance to the issues here.

To be clear, the City is not intending to terminate the use of the Premises as a public freight rail terminal. Petitioners attempt to elevate their occupancy for the purpose of receiving shipments of brick, storing bricks and distributing bricks by truck to the provision of rail service on the Premises. They contend that the City is attempting to dismantle that rail service. Neither is true. Petitioners occupied the Premises pursuant to the Tri-State Ancillary Agreement which expressly stated that:

> Upon termination or expiration of this Agreement, Tri-State shall remove all of its installations, alterations or additions (as required by the Operating Agreement), and equipment for the Tri-State Premises and will quietly yield and surrender the Tri-State Premises to D&H in as good condition as the Tri-State Premises were in when it took them.

Petition at Exhibit B. Specifically, with respect to termination, the Tri-State Ancillary Agreement stated:

> Except as otherwise agreed with Apple or D&H, if the Operating Agreement terminates, this Agreement shall terminate and the parties shall be relieved of any further liability or obligation under this Agreement....

Id. It is undisputed that the Operating Agreement and the Tri-State Ancillary Agreement have both terminated. Pursuant to the terms of those agreements, Petitioners are now obligated to surrender the Premises. However, rather than comply with the terms of the Tri-State Ancillary Agreement, Petitioners are advancing a baseless argument that the City is ending rail service on the Premises. In other words, the Petitioners are improperly attempting to use the shield of federal preemption to avoid the effects of valid legal agreements that they entered into voluntarily. The Board has frequently stated that it will not allow its jurisdiction to be used as a shield from the legitimate processes of state law where no overriding Federal interest exists. *See CSX Corp., et al-Adverse Abandonment Application-Canadian National Railway Company and Grand Trunk Western Railroad, Inc.*, STB Docket No. AB-31 (Sub-No. 38) (Served Feb. 1, 2002).

IV. The Board does not have jurisdiction in this matter and as a result should not get involved in setting any rates or fees between the Petitioners and the City.

As in *Hi-Tech*, there is no dispute here over which the Board has jurisdiction. It is well-settled that the Board does not involve itself in contractual disputes but refers those matters to state law. *See CSX Corporation and CSX transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company--Control and Operating Leases/Agreements--Conrail Inc. and Consolidated Rail Corporation*, STB Finance Docket No. 33388, 1998 STB Lexis 203 (STB 1998) (Contract interpretation issues are not within the purview of the Board); *Philips Lighting*

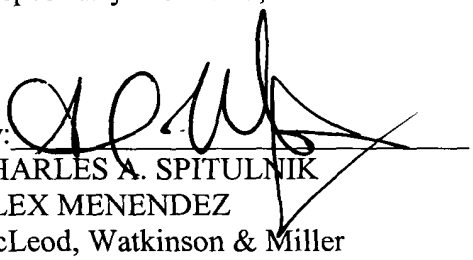
Co.--Petition for Declaratory Order--Certain Rates and Practices of J.K. Hutch, Inc., STB No. 420241998 STB LEXIS 214 (STB 1998) (Issues involving interpretation of contracts may be resolved by the court without a determination by the Board). This is a matter to be resolved in the courts of the State of New York, not before this Board. As a result, the Board should decline Petitioners' invitation to participate in that resolution.

CONCLUSION

WHEREFORE, EDC and NYC respectfully request that this Board issue an order denying Petitioners' request for Declaratory Order because this Board's and the Third Circuit's rulings confirm that Petitioners are not rail carriers providing transportation subject to this Board's jurisdiction. In the alternative, EDC and NYC respectfully request that, if the Board determines that further proceedings are required, it establish an expedited schedule for further submission of evidence and argument and for resolution by this Board in order to effect a prompt declaration of the Parties' rights and obligations.

Dated: February 15, 2006

Respectfully submitted,



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Counsel for the New York City Economic Development Corporation and the City of New York

VERIFICATION

City of New York)
) ss:
State of New York)

Joan McDonald makes the following oath and says that she is Senior Vice President of the Defendant New York City Economic Development Corporation ("NYCEDC"), that she has been authorized by NYCEDC to verify the facts stated in the foregoing Opposition of The New York City Economic Development Corporation and the City of New York to Petition of Tri-State Brick and Stone of New York, Inc. and Tri-State Transportation Inc. for Declaratory Order, that she has carefully examined all of the statements in the foregoing Opposition, that she has knowledge of the facts and matters relied upon in the Opposition, and that all factual statements and representations set forth therein are true and correct to the best of her knowledge, information and belief.

Joan McDonald

Subscribed and sworn to
before me this 14th day of February, 2006.

Judith A. Capolongo
Notary Public

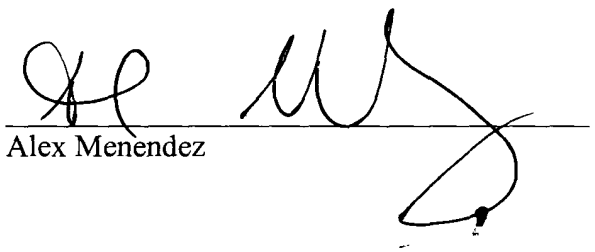
My Commission Expires: October 1, 2007

JUDITH A. CAPOLONGO
Commissioner of Deeds, City of New York
No. 5-1425
Cert. Filed in New York County
Commission Expires October 1, 2007

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of February, 2006, a copy of the foregoing Opposition of the New York City Economic Development Corporation and the City of New York to Petition of Tri-State Brick and Stone of New York, Inc. and Tri-State Transportation Inc. for Declaratory Order was served by first class mail, postage prepaid, upon the following:

John F. McHugh, Esquire
Attorney at Law
6 Water Street, Suite 401
New York, NY 10004



Alex Menendez

ND: 4839-0064-2560, Ver 1

EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TRI-STATE BRICK AND STONE OF NEW YORK, INC.
d/b/a TRI-STATE BRICK & BUILDING MATERIALS
and TRI-STATE TRANSPORTATION, INC.

05 Civ. 7561
Judge Daniels

Plaintiffs,

v.

NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION,
APPLE INDUSTRIAL DEVELOPMENT CORP. and THE CITY
OF NEW YORK,

Defendants.

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF A PRELIMINARY AND A PERMANENT INJUNCTION

John F. McHugh
6 Water Street
New York, N.Y. 10004
212-483-0875

CONTENTS

TABLE OF AUTHORITIES

SUMMARY

Plaintiffs depend on common carrier railroad service and terminal facilities located at 65th Street Yard in Brooklyn, N.Y. (hereinafter variously "the Yard", "65th Street" or "the Terminal"). Plaintiffs have been ordered by defendants to quit the Yard. Plaintiffs seek a preliminary injunction. Federal Law prohibits Defendants either as land owners or as local agencies from closing an active rail terminal without the pre-approval of the United States Surface Transportation Board.

When measured in terms of the amount of money which can be generated by land use charges, rail facilities are rarely the most lucrative use. Thus, the City of New York Economic Development Corporation (hereinafter "EDC") is engaged in a campaign to rid City owned land of all such uses, apparently so that the land can be leased to non-common carrier entities which will generate more revenue for the EDC. In that pursuit, EDC is reversing City and defying State and national policies which seek increased use of rail for freight transportation. Indeed EDC is scrapping the only public rail freight terminal in Brooklyn after years of its development with taxpayer funds. No public notice of that decision has been given; no environmental review has been conducted as required by State law. The Uniform Land Use Planning procedures mandated by the City Charter have been ignored. Plaintiffs are in this court however, as federal policy is enforceable under Federal Law which renders defendants' actions not only poor public policy and grossly unwise but unlawful.

Plaintiffs are customers and/or providers of common carrier rail service via these public freight terminal facilities. Until July 31, 2004, the Canadian Pacific Railroad

(hereinafter "CPR") under an Operating Agreement with defendant, EDC operated the Terminal and service. The CPR reached and served the Yard by a Haulage Agreement with the New York and Atlantic Railroad ("NY&A"). The Operating Agreement with CPR was terminated in July of 2004. City now seeks to force the abandonment of all common carrier rail service provided to the general public via the Yard. However, NY&A, a common carrier by rail, has continued that service, the service which the plaintiffs are using. NY&A has not sought to discontinue that service.

The defendant, City, has now served the plaintiff with a notice that it is to terminate its use of that Terminal by August 31, 2005 or face an eviction proceeding. The defendants have not been authorized by the Surface Transportation Board (hereinafter "STB" or "the Board") to abandon rail service at the Yard. Further, both NY&A and the plaintiff have separately made offers to the EDC to continue common carrier rail service in perpetuity, offers which must be granted on reasonable terms by the STB in any abandonment proceeding.

As a result of the EDC's attempt to force abandonment, plaintiffs' businesses are to be terminated in one case and irreparably harmed in the other. Plaintiffs, therefore, seek an injunction against any effort by the defendants to interfere with rail service or to, in any way, restrict the shipping public's access to rail service at the Terminal.

FACTS

Pursuant to an Operating Agreement with Apple Industrial Development Corp. ("Apple"), a subsidiary of the EDC Exhibit A[1], CPR agreed to provide rail freight service to the Borough of Brooklyn *via* the Terminal using transload facilities within or to

[1] All exhibits referred to in this memo are affixed to the declaration of John F. McHugh dated August 22, 2005 and submitted herewith.

be constructed within the Yard. The terminal is on a parcel of real property owned by the City of New York and managed by the EDC. The property, devoted to rail use since the 1870's, was redeveloped as a multi-purpose rail freight terminal by the City of New York using City and State funds, Declaration of William B. Galligan, ¶¶ 4 and 8.

That Terminal lay idle for years until the division of Conrail between two major rail carriers, CSXT and Norfolk Southern. When the agreements between those carriers continued a single carrier monopoly on line haul rail freight access to New York City, the State petitioned for and obtained trackage rights for the CPR from the Albany area to Fresh Pond Jt. in Queens. By the Operating Agreement and the Haulage Agreement here in issue, the CPR extended its service about 9 miles from Queens to and into the Terminal, located on the Brooklyn waterfront in Bay Ridge in 2002. Declaration of Robert J. Turzilli, ¶ 9.

On June 18, 2002, months after signing the Operating Agreement, CPR entered into an Ancillary Agreement with plaintiff, Tri-State Brick and Stone of New York, Inc. (hereinafter "Tri-State") allowing the plaintiff the non-exclusive right to transload brick and stone arriving by rail car to connecting trucks and to hold brick in transit on the property as part of its transloading operation, (Turzilli ¶ 5,) Exhibit B. That agreement was co-terminus with the Operating Agreement and contained mutual covenants preventing either party from actions which could cause a default, *i.e.* early termination of the Operating Agreement. Both the Operating Agreement and the Ancillary Agreement have provisions requiring good faith efforts to extend the usage beyond the termination dates.

Plaintiff, Tri-State, entered into an agreement with plaintiff, Tri-State Transportation Inc. (hereinafter "Transportation") to provide all transloading and storage services at the facility, Turzilli ¶ 7. Transportation engages only in receiving freight in rail cars, unloading that freight and loading it onto common carrier or consignee's trucks which deliver it to consignees as provided in the bills of lading. Over 90% of all goods handled by the Terminal are the property of Tri-State customers, id. All of Tri-State's sales contracts are FOB the manufacturer. A small amount of cargo is handled by Transportation for other brick and stone merchants or their customers and Transportation has offered to handle cargos for any customer of the rail common carrier serving the Terminal including a company seeking to move salt, id. Transportation's service is necessary for Brooklyn residents to access rail service as few if any have a rail siding available to them and there are no other public transload facilities available in Brooklyn,[2] Galligan ¶ 17 Turzilli ¶ 10. Trucks carry about one fifth the capacity of a rail car mandating storage capacity as part of rail service, Turzilli ¶ 8. The average rail car handled by Transportation has traveled over a thousand miles between the origin of the product and the Brooklyn Terminal, Turzilli ¶ 15.

In early July, 2004 the CPR entered into an agreement with the EDC terminating its rail service to the Yard as of July 31, 2004 (see Exhibit C). Neither the EDC nor the CPR obtained approval of this abandonment by the STB. Both the NY&A and plaintiffs (Exhibit E) [each a financially responsible person and therefore qualified to assume such an operation 49 U.S.C. § 10904(f)(4)(A)] have informed the defendant, EDC, that they

[2] The New York Cross Harbor Railroad has a small facility in the vicinity of 51st St, several blocks from 65th St. EDC also seeks to evict that operation. Due to the cloud over the operation caused by the City's goal of ending rail service, NYCH has been unable to fix ancient facilities and its service is therefore unreliable. It also has little space for Transloading. Thus, it is not deemed to be an option at this time.

are willing to assume all the common carrier responsibilities relinquished by CPR relating to continuing rail service to and at the Yard. NY&A has continued service to the Terminal. On July 27, 2005 the defendant, the City of New York, notified the plaintiffs that they must terminate rail operations at the Terminal, before August 31, 2005, Exhibit F.

The extension of CPR service from Fresh Pond Junction to Brooklyn caused CPR services to reach an area then served by the New York Cross Harbor Railroad (hereinafter "NYCH") and by Norfolk Southern Railroad, which has a Haulage Agreement with NYCH, Galligan ¶ 10. The purpose of the CPR extension to the Terminal was to promote "...the transportation of freight at the premises and providing equal commercial access to other companies that desire to utilize the rail freight facilities at the premises." Operating Agreement Exhibit A at pg. 1.

Plaintiffs received notice of CPR's termination of service in mid June of 2004, Exhibit C. Between that date and January, 2005 the plaintiffs engaged in discussions with the EDC on their future right to use the Terminal and to receive rail service, including plaintiff's offer of January 20, 2002 (Exhibit E) to assume all of CPR's common carrier obligations under the Agreement.

In January of 2005 the EDC published a request for proposals for a tenant for the half of the Yard on which plaintiffs work. The NY&A responded stating its desire to continue to serve the Terminal and to develop the entire Yard as a transload Terminal and interchange integral to its service. EDC has not stated its purpose or given notice as to what it has chosen as a suitable tenant, Galligan ¶ 16. There is no indication, other than the facts set forth here, that any decision has been made by EDC with regard to the future

use of the Yard other than to terminate its use as a common carrier public terminal. No mandated environmental review of any such decision has occurred.

From July of 2004 to date, plaintiffs have sought to find alternate facilities for the transloading operation, Turzilli ¶ 10. None can be found within Brooklyn, the City of New York or its Eastern suburbs or even in New Jersey. Either the State of New York or the City of New York own all but one rail property located East of the Hudson and nearly all of these former yard properties have been devoted to non-common carrier rail freight purposes, Galligan ¶ 20. The Yard and facilities on the Brooklyn Waterfront, which EDC also wishes to devote to other uses, are the only rail assets now remaining with useable public terminal facilities. Abandonment of the Terminal will bar the growth of rail use in the region, see Galligan, generally.

Tri-State's product is unique, high grade building products found in remote locations, Turzilli ¶¶ 3, 4 and 15. Its products must be delivered on time to fulfill its customers' contractual obligations, Turzilli ¶ 20. Tri-State arranges transportation for most shipments as the goods are sold FOB the point of origin. It pays Transportation for all services related to Transloading. Transportation or the customer hires common carrier trucking to deliver the customers' cargos from the Terminal as directed by the customers. Transportation handles a small number of carloads for customers other than Tri-State and has informed the rail carrier that its facilities and services are available to all the railroad's customers as needed. The termination of service which the defendants seek to cause will put the plaintiffs out of business indefinitely and will subject them to loss of good will and future business. Turzilli, ¶¶ 3, 4 and 16.

Studies conducted by the EDC establish that proper use of this line and terminal for the purposes for which it was acquired by the City would, if properly managed, divert 459,000 annual tons of general freight from the region's highways in addition to that of the plaintiff, Galligan ¶ 14, Exhibit D. Currently the plaintiffs alone handle 300 loaded cars a year or about 300,000 tons. Congress has just appropriated one hundred million dollars for engineering studies to build a tunnel to connect the facilities here in issue directly to the national railway system which terminates, without a significant detour, in New Jersey. If EDC is allowed to continue its policy of abandonment of all public rail terminal facilities, the freight which could enter the city by rail will have no ability to do so. Indeed, the Yard is the last public rail terminal facility available to facilitate the expansion of common carrier rail service in New York City. To the extent that the Yard has not achieved market share, EDC has obstructed achieving that goal by refusing to allow sufficient access between the street and the public terminal. Galligan, ¶ 10. EDC's policy is irrational.

JURISDICTION

49 U.S.C. § 10903(a) (1) provides:

> A rail carrier providing transportation subject to the jurisdiction of the Board under this part who intends to-
> (A) abandon any part of its railroad lines; or
> (B) discontinue the operation of all rail transportation over any part of its railroad lines,
>
> Must file an application relating thereto with the Board. An abandonment or discontinuance may be carried out only as authorized under this chapter.

49 U.S.C.§11101 of the ICCTA provides that rail carriers must provide service on reasonable request and that contractual arrangements which "deprive a carrier of its

ability to respond to reasonable requests for common carrier service are not reasonable" 49 U.S.C. § 10102(5) defines a rail carrier as "a person providing common carrier railroad transportation for compensation". A railroad includes a "... terminal, terminal facility, depot, yard and ground, used or necessary for transportation" 49 U.S.C. §10102(6) (C), (emphasis added) and transportation includes a "...property, facility, instrumentality or equipment of any kind related to the movement...of property by rail regardless of ownership or and agreement concerning use..." 49 U.S.S. §10102(9) (a).

49 U.S.C. § 1704(c)(1) grants this court concurrent jurisdiction with the STB to adjudicate actions relating to violations of the Act or of orders of the Board, Pejepscot Industrial Park, Inc. v. Maine Central Railroad Co. 215 F. 3d, 195, 204 (1st Cir. 2000). Sovereign immunity does not bar federal claims under 28 U.S.C. § 1983 against state entities. Felder v. Casey, 487 U.S. 131, 153 (1988). Therefore, the actions complained of violate Federal Law, are actions taken by a City owned corporation operating under color of State law and raise causes of action which are within this court's jurisdiction. Further, this court has pendant jurisdiction over purely State Law issues arising under Article 78 of the New York State Civil Practice Law and Rules.

POINT I

THE DEFENDANTS' ATTEMPT TO FORCE ABANDONMENT OF COMMON CARRIER RAIL SERVICE VIA THE YARD IS UNLAWFUL

The Yard consists of "ground" and, "facilities" used for or necessary for railroad transportation. These are tracks and associated facilities where freight is transloaded, i.e. transferred between transportation modes, in this case between rail cars and trucks, Galligan ¶ 17. The Terminal is one of the last two small rail terminals in Brooklyn and

one of but a few in the entire City of New York, Galligan ¶ 20. Therefore, the facilities in question may be

> "...in railroad parlance be termed spur, side, team or industrial tracks. Such tracks may, however, be impressed with functions beyond those normally ascribed to them, as here they are the sole terminal facilities held out to the public for access to the main line. So long as these tracks are impressed with such an additional function they are, for purposes of § 1(18)-(22), inseparable from the main line and they may not be abandoned without an I.C.C. certificate of public convenience and necessity.

Meyers v. Jay Street Connecting Railroad, 262 F. 2d 676, 678, (2d, Cir 1959)[3].

Similarly

> 'A spur may, at the outset, lead only to a single industry or establishment; it may be constructed to furnish an outlet for the products of a particular plant; its cost may be defrayed by those in special need of its service at the time. But none the less, by virtue of the conditions under which it is provided, the spur may constitute at all times a part of the transportation facilities of the carrier which are operated under the obligations of public service and are subject to the regulation of public authority. As was said by this court in Hairston v. Danville & Western Rwy. Co., Supra (208 U.S. 598 (28 Sup.Ct. 331, 52 L.Ed. 637, 13 Ann.Cas. 1008)): 'The uses for which the track was desired are not the less public because the motive which dictated its location over this particular land was to reach a private industry, or because the proprietors of that industry contributed in any way to the cost.' There is a clear distinction between spurs which are owned and operated by a common carrier as a part of its system and under its public obligation and merely private sidings.

Nordgrad v. Marysville & N. RY. Co., 218 F. 737,742-43 (9th Cir 1914).

By devoting its property and facilities, such as the sidings and platforms built by the City at the Yard to common carrier railroad purposes to facilitate access by local industry to rail services and by commencing common carrier services, the EDC and its subsidiary, Apple, became obligated to continue that service until relieved of that

[3] Under the Act in place in 1914 Sidings and Spurs were outside ICC jurisdiction. Under the ICCTA they are within STB jurisdiction but not subject to regulation. However, the status of a track as a siding or spur is a matter of interpretation based upon function. The case law relating to that issue is still binding.

obligation by the STB. EDC and Apple took full advantage of their status as a railroad when that suited their purposes:

> In this proceeding, the new track will be operated by rail carriers (NS, CSXT, and Conrail) as part of the interstate rail network. The fact that the track owner, petitioner NYCEDC, is not itself a rail carrier is not relevant....

CF: The New York City Economic Development Corp-Petition for Declaratory Order, FD 34429 Decided: July 15, 2004, (finding that a rail spur line being built by EDC on Staten Island to serve a City municipal solid waste transloading operation was a railroad under the exclusive jurisdiction of the STB and as such, is exempt from both New York State and New Jersey environmental and waste control licensing regulations). The Yard was also a rail terminal facility built by the City to be used by common carriers to provide service to the entire public. Here, however, the facilities are not to be used in the future as a link between the rail common carriers and the public. The current use was the use for which all State and City funds were expended to purchase and develop these facilities, Galligan ¶ 8.

At the Yard EDC engaged the CPR, a major transcontinental rail common carrier to actually operate the service. CPR, in turn, engaged the NY&A, a railroad authorized to operate freight services on the MTA owned Long Island Railroad, to provide service from CPR's junction with NY&A at Fresh Pond in Queens to and into the Yard. While CPR has released its rights, NY&A continues to provide the connecting service to and within the Yard including access via the Terminal facilities in issue. NY&A has not sought to abandon that service.

As the Second Circuit stated in Meyers v. Jay Street Connecting Railroad, defendants cannot suspend a rail service which connects customers with the national railroad system without the approval mandated by law, now that of the STB. The Supreme Court has explained that Terminal facilities are an integral part of a common carriage:

> The transportation performed by the railroads begins and ends at the Terminal. Its docks and warehouses are public freight stations of the railroads. These with its car floats, even if not under common ownership or management, are used as an integral part of each railroad line, like the stockyards in United States v. Union Stockyard, 226 U. S. 286, . and the wharfage facilities in Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498. They are clearly unlike private plant facilities. Compare Tap Line Cases, 234 U. S. 1, 25. The services rendered by the Terminal are public in their nature; and of a kind ordinarily performed by a common carrier.

United States v. Brooklyn Eastern Dist. Terminal, 249 U.S. 296, 304 (1919). Under Meyers, supra and US v. BEDT supra the Terminal is a rail line which services plaintiff and others. The fact that plaintiff, Tri-State arranges most of the shipments handled by Transportation for Tri-State's customers and that other shippers constitute a small number of annual shipments at this time is irrelevant to the common carrier by rail status of the Terminal, United States v. Louisiana P&R, 234 U.S. 1, (1914):

> It is insisted that these roads are not carriers because the most of their traffic is in their own logs and lumber, and that only a small part of the traffic carried is the property of others. But this conclusion loses sight of the principle that the extent to which a railroad is in fact used does not determine the fact whether it is or is not a common carrier. It is the right of the public to use the road's facilities and to demand service of it, rather than the extent of its business, which is the real criterion determinative of its character.

The fact that CPR has unlawfully abandoned its service has no effect on the status of the rail line or of the common carrier service provided on that line. Indeed, where, as here, an entity with the right to serve a station utilizing the facilities of another common

carrier, abandons that service, the common carrier obligation and the franchise in question reverts to the owner or to the final entity to exercise or hold the underlying common carrier obligation See: Delaware and Hudson Company, Inc. - Discontinuance of Trackage Rights Exemption - In Susquehanna County, Pa. and Broome, Tioga, Chemung, Steuben, Allegany, Livingston, Wyoming, Erie and Genesee Counties, NY - In the Matter of an Offer of Financial Assistance, AB-156, pgs. 2-3 (STB March 29, 2005), In Smith v. Hoboken Shore Warehouse and SS Connecting Railroad, 328 U.S. 123, 130 (1945). the Court noted:

> Here the question is whether the lessee or the lesser shall perform the service. But § 1(18) provides that 'no carrier by railroad' shall abandon 'the operation' of all or any portion of a line without a certificate from the Commission. Discontinuance of operations by the trustee is abandonment of operations by a carrier within the meaning of § 1(18).

(trackage rights service terminated due to common carrier's lack of funds must be continued by common carrier track owner)

Should an abandonment of any right, lawful or unlawful, threaten a cessation of rail service, both the NY&A and Tri-State, clearly each a financially responsible person, 49 U.S.C. § 10904(f) (4) (A), would have the right to prevent that abandonment by seeking to acquire the service and under such circumstances the terms of any required land use would be set by STB, 49 U.S.C. §10903(c) and 49 C.F.R. §1152.27(c) (i).

NY&A, the current rail service provider, has not petitioned to abandon the public terminal and indeed has also submitted a letter to the defendants that it would be willing to operate the facility. Therefore, the defendants' attempt to evict the plaintiff is an adverse abandonment. Neither the termination of the Operating Agreement or of the Ancillary Agreement entitles the defendants to withdraw lands from common carrier

service. Preservation of scarce railroad capacity particularly in the City of New York is presumed to be in the public interest as a matter of law, See: New York Cross Harbor Railroad v. Surface Transportation Board, 374 F.3d 1177, 1182 (D.C. Cir. 2004). Indeed, the lack of rail infrastructure in New York is a major national security concern:

> Domestically, our lack of investment in freight and bimodal infrastructure is choking our highways and bridges. Consider the example of New York. The metro New York area is the largest consuming region in the country. Almost 320 million tons of freight is shipped across the Hudson River every year to meet the demand for goods and services.
>
> However, with no fixed rail freight infrastructure across the Hudson River within 140 miles of New York City, less than 2 percent of all freight enters the East-of-Hudson region by rail. Because of this rail route inefficiency, 30,000 trucks a day clog key crossings like the George Washington and Verrazano-Narrows bridges, with each large freight truck equivalent to the roadway capacity of four passenger vehicles.

BARRY McCAFFREY, General (Ret.), Professor, International Security Studies, West Point, Speech, Chicago IL, June 14, 2005.

Defendants would have a heavy burden to meet the criteria to justify an abandonment of this public freight terminal where, as here, EDC's own studies establish that preservation of such service yields significant public benefits, Galligan ¶ 12. Thus, beyond being patently unlawful, the defendant's actions are irrational.

EDC, is or hosts a common carrier by rail subject to the provisions of 49 U.S.C. § 11101, supra 49 U.S.C. § 10903 *supra*, 49 U.S.C. §10903(c) and 49 C.F.R. §1152.27(c)(i). If the EDC is not found to be a common carrier, the last common carrier to have the obligation to serve the premises retains that obligation and right until relieved of that obligation by the STB, See:Delaware and Hudson Company, Inc. - Discontinuance of Trackage Rights Exemption - In Susquehanna County, Pa. and Broome, Tioga, Chemung,

Steuben, Allegany, Livingston, Wyoming, Erie and Genesee Counties, NY - In the Matter of an Offer of Financial Assistance, supra. Any abandonment of service must not only be by petition to the STB but must be subject to the rail service preservation provisions of the ICCTA.

Therefore, plaintiffs have a high probability of success on the merits.

POINT II

THE FACILITY OPERATED BY PLAINTIFF UNDER THE NON-EXCLUSIVE ANCILLARY AGREEMENT IS A PUBLIC TERMINAL FACILITY WHICH MUST BE PROVIDED BY THE COMMON CARRIER AS PART OF ITS SERVICES AND IS THEREFORE INTEGRAL TO AND MAY NOT BE SEPARATED FROM THE SERVICE

The court in US v. BEDT supra and Green Mountain Railway v. State of Vermont, 2005 WL 851705 (2d Cir 2005) restated the rule that transportation service requires not only transporting goods or people from place to place but that the carrier's service includes associated terminal services for transloading cargos and holding them for delivery. In Secretary of Agriculture v. United States, 347 U.S. 645, 647 (1954), the court dealt with the scarcity of rail facilities in the City of New York. "(T)he general rule is that it is the responsibility of the carrier, as part of the transportation service covered by the line-haul rate, to 'deliver' the goods by placing them in such a position as to make them accessible to the consignee." The unloading service is part of the line haul as New York does not have adequate facilities at which shippers can unload their own cars. Therefore, the terminal facilities at the Yard are required, "in order to effectuate a delivery." Intech, Inc. v. Consolidated Freightways, Inc. 836 F.2d 672, 674 (1st Cir, 1987) (delivery not complete until cargo unloaded where unloading service was part of the transportation contract); Keystone Motor Freight 675 Lines v. Brannon-Signaigo

Cigar Co., 115 F.2d 736, 738 (5th Cir.1940) (carrier responsible for storage where goods can not be delivered during the business day); Brockway Smith Co. v. Boston and Maine Corp., 497 F.Supp. 814, 818 (D.Mass.1980) (delivery on customer's siding where the railcar can not be seen is not final until notice is given). Therefore, defendants' common carrier obligation includes the effective delivery of the brick in cars on the team track with facilities available to access the cargo from the street at a cost which is reasonable Secretary of Agriculture, supra, pg. 650. Storage of goods awaiting final delivery by truck is an integral part of rail transportation, Green Mountain RR v. State of Vermont Supra. Indeed, it is well established law that a rail common carrier must "...furnish reasonable trackage facilities and means to serve the consignees at the particular station as measured by the volume of business handled in and out of the station. Each consignee and shipper at the station is entitled to the service which reasonable facilities ought to afford him." St. Louis, Southwestern Railway Co. v. Mays, 177 F. Supp. 182, 184-85 (D. Ark. 1959). These services and facilities must be maintained 49 U.S.C.§11101, supra. Neither the line of railroad nor its transloading facilities can be discontinued due to termination of the Operating Agreement or the Ancillary Agreement. See, Ex. New York Cross Harbor v. S.T.B., Supra 1182.

Notwithstanding its jurisdiction, even the Board can not grant EDC a forced abandonment of an operating railroad because EDC seeks a more profitable use for the land. Rebutting the STB's argument that EDC represented the public interest and that its wish to devote rail terminal lands in Brooklyn to different uses met the public convenience and necessity test, the court stated that such a singular consideration did not establish that abandonment met that test, particularly in light of the national policy of

preserving rail services whenever doing so was feasible due to the continued willingness of a common carrier to provide the service:

> There are thus articulated at least four interests to balance: (1) the railroad; (2) the owner and/or the public; (3) the shippers; and (4) interstate commerce and the rail system in general. See (the public convenience and necessity "standard requires the Commission to balance the respective interests of the carrier, protesting communities and shippers, and interstate commerce generally"); See also Colorado v. United States, 271 U.S. 153, 168–69 (1966)

New York Cross Harbor Railroad v. Surface Transportation Board, Supra. There, as here, the EDC sought to cut the heart out of an operating rail operation by evicting the railroad from a terminal without which it could not operate its interstate services. Here the CPR has willingly allowed itself to be evicted from such a terminal terminating its services to Brooklyn. However, here the NY&A, fulfilling its responsibilities as a common carrier as explained by the STB in Delaware and Hudson Company, Inc. - Discontinuance of Trackage Rights Exemption - In Susquehanna County, Pa. and Broome, Tioga, Chemung, Steuben, Allegany, Livingston, Wyoming, Erie and Genesee Counties, NY - In the Matter of an Offer of Financial Assistance, supra, has continued the service and has expressed no desire to cease that operation. NY&A has expressed the desire to replace the CPR as the facility operator, as has the plaintiff. In spite of a year of effort no other suitable location for this rail terminal can be found. Where, as here, there is a paucity of rail terminal facilities, the court in: Secretary of Agriculture v. United States, Supra, held that the scope of line haul railroad service includes the of a terminal and transloading service, as carriers must effectuate delivery. Therefore, the City cannot force abandonment of one of, if not the only, public rail freight terminal in Brooklyn.

All of these factors as well as the effects of the abandonment on the national rail system as a whole and on national environmental conditions are a required element of the

STB's consideration of any abandonment petition. Here, the local v. national issue is quite clear, the City seeks to impose 300,000 annual tons requiring 1,900,000 vehicle miles one way on the national highway system, and to scrap the public investment in rail facilities at the Yard so that it can maximize the short term cash return from lands which have been devoted to rail services for over a century. By failing to file for abandonment, all concerned parties, including the broader public interest, have been denied due process of law and the plaintiffs are now threatened with a denial of rail service mandated by Federal Law. In particular, they have been denied the ability to preserve service as is mandated by that law.

Here, where leave of the STB is legally mandated, and no such leave has been obtained, the acts complained of are illegal and should be permanently enjoined. Plaintiffs have shown a high probability of success on the merits.

POINT III

THE 65TH STREET YARD IS A RAILROAD SERVICE, SUBJECT TO REGULATION BY THE SURFACE TRANSPORTATION BOARD

CPR's Operating Agreement and the Haulage Agreement with NY&A allowed CPR to enter an area of Brooklyn served by NYCH and Norfolk Southern via the NYCH. In Texas & Pacific Ry. v. Gulf, Colo. & S. F. Ry., 270 U.S. 266, 278 (1926) (extension of rail service by a spur line within a city to serve an industry served by another carrier) the United States Supreme Court found that a track should be considered to be a line of railroad and subject to regulation by the Board "...where the proposed trackage extends into territory not theretofore served by the carrier, . . . particularly where it extends into territory already served by another carrier." Here prior to the signing of the Operating Agreement in 2002 the CPR service ended in Queens at a junction where it and CSX

Transportation interchanged traffic with the NY&A. The extension to Bay Ridge placed its terminal less than a mile from the terminal of the NYCH and extended CPR service a few hundred feet beyond the end of the NY&A's rights providing both with a terminal and access to the South Brooklyn market. Previously NY&A had no terminal facilities available to it at the end of its track. The combination of the Operating Agreement and the Haulage Agreement extended the common carrier services of both CPR and NY&A to and into the Yard an area previously served, by other carriers. Thus, the service meets the criteria for a regulated rail line or service as frequently articulated by the STB. See, e.g., Park Sierra Corp. — Lease & Operation Exemption — Southern Pacific Transp. Co., STB Finance Docket No. 34126, slip op. at 5 (STB served Dec. 26, 2001) (Park Sierra); Grand Trunk Western R.R. — Pet. for Declaratory Order — Spur, Industrial, Team, Switching or Side Tracks in Detroit, MI, STB Finance Docket No. 33601, slip op. at 2 (STB served July 30, 1998); Chicago South Shore & South Bend Railroad — Petition for Declaratory Order — Status of Track at Hammond, IN, STB Finance Docket No. 33522, slip op. at 6 (STB served Dec. 17, 1998).

While the ICCTA exempts sidetracks and spurs from any regulation, an extension of a line into a new market area has been well established to be a line of railroad subject to regulation and not a spur, Texas & Pacific Ry. v. Gulf, Colo. & S. F. Ry. Supra. In Meyers v. Jay Street Connecting Railroad, supra, the Court held that a track which was the only link to the line haul was not a spur or siding but in integral part of the main line.

Therefore, common carrier service to and at the 65th Street freight terminal is rail service which can not be abandoned without the approval of the STB. No such approval

being of record, the defendant's actions are unlawful. The plaintiffs have therefore shown a high probability of success on the merits.

POINT IV
IRREPARABLE HARM IS ESTABLISHED

The closing of the Yard and its terminal facilities will put Transportation out of business and make it impossible for Tri-State to deliver material ordered or for it to solicit new business. Tri-State's damages will be irreparable, including the loss of customer good will due to failure to deliver goods ordered, due to delays attendant to attempting to substitute trucks for rail delivery as trucking is not generally available, particularly in the volumes required. No substitute rail service is available as, in addition to the scarcity of facilities, every facility on City land is targeted for abandonment by the EDC, see Ex NYCH v. STB Supra (adverse abandonment attempted by EDC to close the only other rail operation on the Brooklyn waterfront due to termination of a lease). Further, as there is a nation wide scarcity of trucks, substitute service can not be readily assured. Therefore, if the defendants are not enjoined, plaintiffs can not fulfill existing contractual obligations and can not meet the industries needs, facts which will destroy a reputation built over many years.

> . . . the loss of goodwill from CN's existing customers is irreparable, as is the loss of goodwill from prospective customers. The loss of future contracts and the loss of the opportunity to enter a market, here the market for transportation of CDD, are inherently speculative, making damages too difficult to calculate. Hence, these loses are also irreparable. Cf. CNFR Operating Co., 282 F. Supp. 2d at 1119. Consequently, based on the loss of goodwill, future contracts and market opportunities, the Court concludes that CN will suffer irreparable injury without the preliminary injunction.

Canadian National Railway et al v. City of Rockford et al 2005 WL 1349077 (E.D. Mich. June 2, 2005), Courts of this district have also recognized that loss of good will is

irreparable particularly where, as here, Tri-State trades in high end brick and stone obtained from distant locations, a unique product.

> (T)erminating the delivery of a unique product to a distributor whose customers expect and rely on the distributor for a continuous supply of that product almost inevitably creates irreparable damage to the good will of the distributor. Jacobson & Co. v. Armstrong Cork Co., 548 F.2d 438, 444-45 (2d Cir.1977) (threatened loss of customers and good will from manufacturer's termination of supply of a brand of products to distributor posed irreparable injury); Interphoto Corp. v. Minolta Corp., 295 F.Supp. 711, 723-24 (S.D.N.Y.) ("it would be impossible to estimate or compute [movant's] damages for the loss of good will it will suffer as a result of being unable to provide its retail customers with [opponent's] products."),

Reuters Ltd. v. United Press Intern, Inc. 903 F.2d 904. 907-908 (2d Cir. 1990)

> Plaintiffs have shown the likelihood that continuance of defendant's deceptive practices will cause irreparable injury in terms of loss of customers, goodwill, and reputation. This injury is likely to be compounded unless defendant is enjoined from continuing its activity

Crossbow, Inc. v. Dan-Dee Imports, Inc. 266 F. Supp. 335, 341 (S.D.N.Y. 1967).

Irreparable harm is also established by the abridgement of a constitutionally protected right. American Civil Liberties Union v. Reno, 217 F. 3d 162, 179, *aff'd*, 521 U.S. 844 (3rd Cir. 1996); Jefferson Ltd. v. City of Columbus, 211 F.Supp.2d 954, 962 (S.D.Ohio 2002) (restriction on adult entertainment deemed violative of the First and Fourteenth amendments, establishing irreparable harm), Harris v. Gaddick , 593 F. Supp.128, 135 (M.D. Alabama 1984) (interference with the right to vote establishes irreparable harm), Alton Box Board Co. et al v. City of Alton, Illinois, 1971 W.L. 764*2 (S.D. Ill. 1971)(threat of prosecution based upon unconstitutional law creates irreparable harm). While these cases all refer to right of expression, they are equally applicable to the denial of railway service at bar as:

> We further concluded that "the dichotomy between personal liberties and property rights is a false one.... The right to enjoy property without unlawful deprivation,

> no less than the right to speak or the right to travel is in truth a 'personal' right, whether the 'property' in question be a welfare check, a home, or a savings account.

Mark E. Dennis v. Margaret L. Higgins, 498 U.S. 439, 446, 111 S. Ct. 865, 870 (1991)

By developing the terminal on the Yard and then entering into the Operating Agreement and commencing rail service, the defendants undertook obligations to the public, including to the plaintiffs imposed by Federal Law to continue to afford the common carrier serving the facilities the use required by the nature of the service. Plaintiffs have the right to rely upon those obligations. "To carry on interstate commerce is not a franchise or a privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States." Crutcher v. Kentucky, 141 U.S. 47, 57, 11 S.Ct. 851, 853 (1891). Western Union Telegraph Co. v. Kansas ex rel. Coleman, 216 U.S. 1, 26, (1910). Defendants now seek to obstruct the exercise of "the substantial rights of those engaged in interstate commerce." All constitutional rights are equally protected from abridgement by State action by the Constitution and by 42 U.S.C. §1983.

While the plaintiff's here have met the standard of proof of irreparable harm imposed by the Second Circuit, where as here plaintiffs have shown a high probability of success on the merits, the standard of proof of irreparable harm is reduced.

> We elaborated upon Hamilton Watch in Unicon Management Corp. v. Koppers Company, Inc., 366 F. 2d 199, 204-05 (2d Cir 1966), and Dino DeLaurentiis Cinematografica, S.p.A. v. D-150, Inc., 366 F. 2d 373, 375 (2d Cir. 1966), where we held that a showing of probable success on the merits was required only where the movant has failed to show either a threat of irreparable harm or a balance of hardships in his favor.

Jacobson & Co. v. Armstrong Cork Co., Supra, 442.

Here, the plaintiffs have shown that the actions sought to be enjoined are patently illegal and violate rights granted to them under Federal Law. Plaintiffs, therefore, have shown sufficient irreparable harm to justify the injunction requested.

POINT V
THE PUBLIC INTEREST IS SERVED BY THE ISSUANCE OF THE INJUNCTION

There is a strong presumption that the preservation of rail service is in the public interest. New York Cross Harbor Railroad v. Surface Transportation Board, Supra, slip Opinion Page 16-17 stated:

> ...the STB neglected to mention its "statutory duty to preserve and promote continued rail service," Western Stock, 1996 WL 366394, *12; see Salt Lake City, 2002 WL 368014 at *4; Chelsea, 8 I.C.C.2d at 779; and, specifically in the context of the "abandonments or discontinuance of rail service," that one of its "function[s] ... is to provide the public with a degree of protection against the unnecessary discontinuance, cessation, interruption, or obstruction of available rail service." Waterloo Ry., 2004 WL 941227, at *3; see Western Stock, 1996 WL 366394, at *12; Modern Handcraft, 363 I.C.C. at 972.10 The Board failed to assess the abandonment's impact on rail service or on interstate commerce generally.

The Western Stock Show Association--Abandonment Exemption--In Denver, Co. Ab-452 (Sub-No. 1x), Service Date: July 3, 1996, (where shippers are using the line, the line cannot be abandoned without evidence of a significant adverse effect on the railway system); Salt Lake City Corporation--Adverse Abandonment--In Salt Lake City, Ut, No. Ab-33 (Sub-No. 183), Service Date: March 8, 2002, ("As the agency has frequently stated, the function of our exclusive and plenary jurisdiction over abandonments is to provide the public with a degree of protection against the unnecessary discontinuance, cessation, interruption, or obstruction of available rail service"); Waterloo Railway Company--Adverse Abandonment--Lines of Bangor and Aroostook Railroad Company and Van Buren Bridge Company in Aroostook County, Maine, STB Docket No. Ab-124

(Sub-No. 2) Service Date: May 3, 2004. (abandonment of service to a rail dependant industry simply to improve the financial position of the line owner does not serve the public convenience and necessity). As in Waterloo the abandonment the EDC seeks to accomplish will allow it to use the land more profitably, but EDC's financial position will have no effect on the national transportation system. Abandonment of a public rail freight terminal in New York City will bar any diversion of traffic from the highway to the railway, a result completely at odds with both national and State policy[4]. No matter the profit to the EDC such a result can not be allowed under the overwhelming weight of authority cited above.

POINT VI
DEFENDANTS ACTIONS ARE ARBITRARY AND CAPRICIOUS AND ARE THEREFORE UNLAWFUL UNDER APPLICABLE LOCAL LAW

Both Mr. Galligan and Mr. Turzilli state, the EDC has neither published nor announced any intention to terminate the use of the Yard as a public rail freight terminal. An administrative determination becomes final and binding when the petitioner is given notice of the determination (see Matter of Biondo v. New York State Board of Parole, 60 N.Y.2d 832, [1983]). A public terminal is open to all shippers. That is a completely different use than any other use of the land. It has broad public benefits where any other use generates only income to the EDC while imposing environmental and economic degradation on the public.

Pursuant to New York City Charter § 197-c[a] [1] and the New York State Environmental Conservation Law § 8-0109(2) (b) a major change in the use of the Yard must be announced. It must be preceded by an environmental review. No review has been conducted of the termination of this use. All reviews of regional freight traffic to

[4] See,Transportation Law §230 et seq.

change in land use. Therefore, the plaintiffs are entitled to an injunction preventing the defendants from any interference with such service.

Dated: August , 2005

John F. McHugh
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6 Water Street
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EXHIBIT B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

TRI-STATE BRICK and STONE OF NEW YORK, INC.,

Plaintiff,

v. 05 Civ. 7561 (GBD)

NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION, *et al.*,

Defendants.

----------x

New York, N.Y.
December 6, 2005
10:35 a.m.

Before:

HON. GEORGE B. DANIELS

District Judge

APPEARANCES

JOHN F. MCHUGH
Attorney for Plaintiff

MICHAEL A. CARDOZO,
Corporation Counsel of the
City of New York
Attorney for Defendants
BY: MINDY R. KOENIG
Assistant Corporation Counsel

ALEX MENENDEZ
Attorney for Defendants

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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Attorney for Defendants
BY: MINDY R. KOENIG
Assistant Corporation Counsel

ALEX MENENDEZ
Attorney for Defendants

(In open court)

THE DEPUTY CLERK: Tri-State Brick v. City of New York.

Counselors, please give your appearances for the record, starting with plaintiff's counsel.

MR. McHUGH: John F. McHugh, 6 Water Street, New York, New York, for Tri-State Brick and Stone of New York and Tri-State Transportation, the plaintiffs.

THE COURT: Good morning, Mr. McHugh.

MR. McHUGH: Good morning, your Honor.

MR. MENENDEZ: Alex Menendez on behalf of Apple Industrial Investment Corp., New York City Economic Development Corporation, and the City of New York.

THE COURT: Good morning, Mr. Menendez.

MR. MENENDEZ: Good morning.

MS. KOENIG: Mindy Koenig, New York City Law Department. I am here on behalf of all the defendants, but Mr. Menendez is here *pro hac vice* and he will be representing the defendants today.

THE COURT: OK.

Let me start with Mr. McHugh. I have reviewed the papers. As they say, let's get to the heart of this.

You say that it is an abandonment of rail service. They basically characterize it as you just want to stay in the yard because you don't want to be evicted. So how do we

resolve this and how do I define this issue?

MR. McHUGH: Your Honor, first a point of order. We had adjourned this session a few times because we were trying to get Mr. Krebs, the president of New York & Atlantic, to appear. He has chosen to submit a declaration instead.

I received this last night around 6:30. When I read it, I found out that he had left out a few paragraphs that were negotiated with the City of New York as to what should properly be in here. I am going to hand this up now. We will have to correct it later today when Mr. Krebs finds he pushes the right button on his computer.

THE COURT: OK.

MR. McHUGH: The issue, your Honor, is the city has taken the position that it has no intention of abandoning rail service at the 65th Street yard, and also it takes the position that it is engaged in a major program to expand rail service in the yard. The problem with it is that my client is a customer of rail service, and rail service is not provision of service to the middle of the field; rail service requires a connection between that service and the economy.

The problem with the city is it doesn't understand that rail service doesn't stop where the train stops. Rail service stops when the cargo shipped by rail makes it to the customer or to the use involved.

The issue before the court is the preservation of the

tag end of rail service, from the side of the car to the street and to the customer. That is the problem with the city's approach to this situation.

The rail service that they say they do not want interfered with, and they say they have no intention of limiting the New York & Atlantic service to the 65th Street yard, yet they are trying to evict all access to the yard.

Access under all the case law to date is an integral part of rail service. This court just recently in the case involving the *Green Mountain Railroad*, the Second Circuit determined that rail service includes the facilities necessary to unload the cars, store the cargo on the facility until trucks can pick it up and transport it out.

The case we cited, *The Secretary of Agriculture v. The United States*, a case from the '50s, describing exactly the problem we have in New York State and in the City of New York in particular, the history of which is gone into in great detail by Mr. Galligan and to some extent in the recent affidavit by Mr. Krebs.

The problem in New York City is an absolute lack of facilities that allow the railroad system to access the public. As Mr. Krebs and Mr. Galligan state, the 65th Street yard is the absolute last piece of property available in the entire region -- that includes New Jersey, New York, Long Island, and Westchester County -- that is available for the expansion of

rail service using the existing system. If we lose this, we have to tear down a neighborhood someplace to replace it.

THE COURT: All right. How does that relate to your right to occupy the space?

MR. McHUGH: Our right to occupy the space is inherent in the fact that we are entitled to access to the railroad transportation that is afforded at that location.

THE COURT: But by definition, wouldn't that mean that everybody who gets to use the railroad has a right to occupy that space?

MR. McHUGH: Absolutely. Our lease is not exclusive. We have no right to the exclusive occupancy of a square foot of that space. We have to share it with anybody else who wants to use it.

Now, the problem is, of course, there is a limit to how many people can be crammed on the same piece of property. But we would have to yield to anybody else who wants to use that property. Our property is no more valuable to the railroad system than anybody else's.

THE COURT: But aren't what you are arguing about is your exclusive use and occupancy of that space?

Nobody else is using that space. You are taking up the space. Their argument is they want to do exactly what you say they should do, is make it accessible to more than just you, but you don't want to get out of the way. Isn't that

their argument?

MR. McHUGH: They have not said that at all.

THE COURT: OK.

MR. McHUGH: Our right is not exclusive. The language in all the agreements in the case, it is not an exclusive right.

We have a right to occupy four and a half acres, but it is not an exclusive right. They have the right that if anybody else wants to go in there, they have the right to do so, and we would have to yield such space as they need to do it. It is a matter of reasonableness. So our space basically could be used by anybody.

As Mr. Krebs says and as Mr. Turzilli says, the Tri-State Transportation that actually operates the facility has offered its services to the New York & Atlantic and to the predecessor, CP, to handle any cargo from any customer who wants to go through there. The problem is access.

As Mr. Krebs and Mr. Galligan say in their affidavits, the City of New York has discouraged any new customer from going in there because they don't want those trucks passing through the Army terminal because it located a daycare center in one of those buildings and they don't want the trucks passing the children.

THE COURT: This isn't an issue about access. This is an issue about, I guess the best way I could characterize it is

a lease agreement.

You are renting space. You are saying that you should have the right to rent and occupy that space. That's not a question of access. Access is a question of whether or not you come in and get out.

What you are here saying is they cannot evict you because you have a rental agreement to occupy that space.

MR. McHUGH: We actually have simply an occupancy agreement, your Honor. It is not a lease per se.

THE COURT: Right.

MR. McHUGH: We have no real estate interest in that property. Our right is only to be there, to do what is necessary to unload the railroad cars and put that stuff on trucks.

The elements of that, because the railroad cars are much bigger than the trucks, the property has to be unloaded from the railroad cars, put on the ground, picked up from the ground, and put on the trucks. Now, that is all we have the right to do there.

We do not own the property, we do not have a lease on the property, and we do not have an exclusive use to the property. We have only the right to access the railroad via that property, for which we are paying a small fee simply to pay for the fact that the property has to sit there for a while, which would be the same fee we would pay a railroad in a

warehouse.

It is exclusively access. We are not talking about a lease here. We are talking about the right to get to the railroad.

THE COURT: Articulate for me what your agreement is. Maybe I haven't looked at it as closely as I should, but I didn't understand your agreement to simply be an agreement which only articulates your access.

MR. McHUGH: The ancillary agreement is Exhibit B to our initial papers. If you go down to the first paragraph, right to use, which is the first paragraph under agreement, the right to use the Tri-State premises shall not be a real property interest but, rather, shall be deemed an agreement by D&H to allow Tri-State to enter the Tri-State premises to perform the purposes provided in this agreement.

Now, the purposes in the agreement is up in C. Tri-State desires to use a portion of the premises for the purposes of receiving shipments of brick by rail, storing brick on the premises, and distributing brick from the premises by truck.

Now, all of those functions in C have been held by the Second Circuit in the *Green Mountain* case back in June to be within rail transportation, within the definition in the Act. So the purposes in the agreement are tied together. We have no right to use that property for anything else.

THE COURT: I am trying to understand what you say the limits of your rights are and agreement.

The way you are arguing it, it seems to me you are saying, look, we have the absolute right in perpetuity to use this particular property for that purpose and there is absolutely no way that they can get us off this property.

MR. McHUGH: The only way they can get us off the property is go to the Surface Transportation Board and allow an abandonment of the service.

Under the holding of *The Secretary of Agricultural v. The United States,* in the City of New York, and indeed with the holding of other cases that are less extreme, access is a critical part of rail transportation. A railroad that just runs through a field is not usable.

THE COURT: But don't all of those cases deal with common carriers? You are not a common carrier.

MR. McHUGH: No.

THE COURT: You don't argue that you are a common carrier.

MR. McHUGH: Transportation fits the definition of a common carrier. Tri-State Brick does not. But Transportation, the entity that is actually doing the loading and unloading, fits the definition of common carrier within the Act and the case law.

THE COURT: But that is not your client.

MR. McHUGH: Yes, it is my client.

THE COURT: Your client is not a common carrier. You are not arguing that your client is a common carrier. If you were the railroad arguing, it would be clear that that would be within that authority.

You are making an argument that any person who uses a common carrier in order to effect their rights of use of the common carrier or access to the premises, that they must have authority from the board or the agency before they can take any action with regard to a person who uses the common carrier or uses the rail yard.

None of those cases specifically say that.

MR. McHUGH: No. The cases say that a common carrier has the obligation to provide rail service which includes access.

THE COURT: OK.

MR. McHUGH: We are a customer of a common carrier which has the right to demand access, as you see in the case, the one about the logging railroads.

THE COURT: But you are arguing about the obligations of the common carrier.

MR. McHUGH: Yes.

THE COURT: The defendants in this case are not the common carrier either.

MR. McHUGH: The defendants in this case have

dedicated their land for well over a century to common carrier use. Under the case of *Orange County*, which we cited to you, a land owner who has property which is dedicated to common carrier service cannot obstruct that service.

THE COURT: Cannot obstruct the common carrier's use of that common carrier's service unless they go to the board.

MR. McHUGH: Right. And a customer has, under the *Lonestar* case, a customer has the right to demand service. In other words --

THE COURT: From the common carrier.

MR. McHUGH: From the common carrier.

THE COURT: How does that translate to demand service from the city?

MR. McHUGH: Because the city, having devoted this land to common carriage, has an obligation to allow that common carrier to deliver the entire service required by a common carrier, which is not just to run a locomotive and a car in there, they must provide access. The city wishes to block access, because these facilities are critical to access.

You cannot unload a car of brick if you have no way to get to that car of brick. Railroads have an obligation to provide access.

THE COURT: OK.

MR. McHUGH: Mr. Krebs says this is the only place that they can provide access to my customer, who is entitled to

their service.

THE COURT: But you keep defining your right as the railroad's obligation, but here you want to say that it is the city's independent obligation.

MR. McHUGH: Yes. As the *Orange County* case says, under the *Orange County* case we had a transit authority that took title to a freight line to use it for transit use. Very similar to what has been going on in New York State.

THE COURT: It is not similar because they don't have -- because they are not the common carrier. By that definition they became the common carrier.

MR. McHUGH: No, they didn't.

THE COURT: In this case that is not what you are arguing. They owned the common carrier.

MR. McHUGH: No. They owned the track. In the *Orange County* case, transit agencies are not common carriers pursuant to the ICC Termination Act. They are separate and apart. Because they take over a freight line does not make them freight common carriers.

Their obligation, however, as land owners, who are not common carriers, as defined by the Interstate Commerce Act, their obligation is to allow the freight operator, that does have the residual common carrier obligation, access, and the land owner cannot interfere with that common carrier's provision of the entirety of freight service.

The entirety of freight service, as defined by all the cases with regard to common carriers, is it has to provide access to the customer. My client, both Transportation and Tri-State Brick, are customers entitled to freight transportation in the City of New York, and they are entitled to access. The city, having taken over railroad lands and devoted them to railroad service -- they basically admit here that they do not want to interfere with railroad service -- must provide access, and they must provide it on reasonable terms pursuant to what the Surface Transportation Board has deemed to be reasonable terms.

THE COURT: Why isn't your dispute with the common carrier?

MR. McHUGH: The common carrier is essentially on our side. The common carrier says they wish to continue serving Tri-State Brick. The common carrier should be here, perhaps, but it doesn't have to be.

We are entitled to demand service from the common carrier. The obstacle here is not the New York & Atlantic railroad, which has stated that they will continue to provide common carrier service to us until blocked by somebody, and they are not blocked at this point. Our obstacle is the city of New York, who wishes to evict us from all access to that railroad service. They as a land owner cannot obstruct common carrier access.

THE COURT: If you say that you don't have any absolute right in perpetuity, exclusive right to occupy this property, I am not quite sure what you say that the city has the right to do.

MR. McHUGH: The city has the right to fair return from its land. It doesn't have to give land to a common carrier in perpetuity for free. It has the right to assess a reasonable amount of money for that right.

Now, we are saying we don't have a right in perpetuity to occupy that land exclusively, but we do have a right in perpetuity to access to the railroad, and the railroad has an obligation to provide that and the city can't step in the way.

Now, what we have here is the city stepping in the way because the argument essentially boils down, your Honor, I think, to the fact that they want commercial level rights for access to this property.

THE COURT: That doesn't deny you access, that just makes it more expensive.

MR. McHUGH: That denies access, because their assessment is in absolute opposition to what the Surface Transportation Board deems railroad lands to be worth.

Very recently in allowing the Canadian Pacific Railroad to come down the east side of the Hudson River and access terminal lands in New York City, the Surface Transportation Board gave an opinion, which was cited in there.

It is part of the *CXS* case, which set the formula in footnote 17 as to how you determine the right to use land.

THE COURT: But that is a dispute over the amount of fees. That is not a dispute over whether or not you have access or don't have access.

MR. McHUGH: The problem now is the city wants us out, and they cannot under all the law that we have cited terminate access to the common carrier. They cannot obstruct access in any way. And this is what they are trying to do. They want to obstruct access, and that makes the New York & Atlantic common carrier rail service inaccessible to the public, and inaccessibility to the public rail service is an interference and a failure to provide service.

New York & Atlantic has the obligation to provide service, we have the right to get that service, and the city has the obligation as the land owner not to stand in the way.

If there is a dispute about the amount of money the city is entitled to, that dispute must be resolved, absent an agreement by the parties, by the Surface Transportation Board.

If, indeed, we had these disputes being handled on the basis of commercial rents, there would be no rail property available anywhere in the country right now, because railroads simply don't have the cost structures and the profits to pay that kind of rent.

The problem we have here is exclusively access. The

agreement that we are relying upon provides us only with access to transportation services, as those services have been defined by the Second Circuit very recently, and the city, under the *Orange County* case, is not entitled to stand as an obstacle to providing the entirety of that service. Indeed, *The Secretary of Agriculture v. The United States* case indicates that access in the City of New York is absolutely critical to rail service and simply cannot be separated from it at all, even to the extent of assessing a separate charge.

So we have cited the case law to your Honor on this issue. There is no confusion here. Access is what the issue is, and we are entitled to it as long as that common carrier service is offered at the 65th Street yard. Not only Tri-State Brick and Stone and Tri-State Transportation have a right to access, but all other customers in Brooklyn have a right to access also. There is a lot of land there, and it isn't being used.

Now, the city's problem here is that this was taken over for railroad purposes by the City of New York and the State of New York in 1971. It wasn't until 2002 that it was actually used for railroad purposes because of this problem with the city's comprehension of its obligations under the Interstate Commerce Act and the ICC Termination Act, which succeeded it, and railroad tracks built and unused is not railroad service.

The city says it wants to be in the railroad business and it wants to provide common carrier service. It has to do it on realistic terms, and this case is the epitome of why that yard was fallow for that length of time, is a failure to comprehend on the part of the city as to what its obligations are as a land owner to facilitate the transportation services it says that it wishes.

Thank you, your Honor.

THE COURT: Mr. Menendez.

MR. MENENDEZ: May it please the court.

THE COURT: Why don't you tell me basically what the city is trying to accomplish.

MR. MENENDEZ: Your Honor, the city is trying to evict an entity that is illegally on its property. This is not about denying common carrier access to the 65th Street rail yard. It never has been.

THE COURT: In what way do they have common carrier access if you evict?

MR. MENENDEZ: New York & Atlantic, the operating railroad, is the common carrier here. Tri-State is not involved in the equation when we are talking about common carrier access to the 65th Street rail yard.

THE COURT: So you're saying the city's concern is only the common carrier access, not access to those people who utilize common carrier.

MR. MENENDEZ: The city obviously would like people in there who are paying a fair rent with respect to the 65th Street rail yard so the common carrier when providing access to the 65th Street rail yard has customers that it's dealing with.

But the real issue here, your Honor, is that counsel for Tri-State keeps talking about an agreement or a lease. There is no agreement here. There is no lease. This ancillary agreement they are speaking of is an agreement they entered into with CP, which was subject to an operating agreement that CP entered into with the City of New York.

Now, the ancillary agreement was very clear in its language. It was subject to the operating agreement. To the extent that operating agreement was ever terminated, then that ancillary agreement then was terminated and their rights to be on the 65th Street yard were then extinguished.

Even if you take that and give them the benefit of the doubt there, the ancillary agreement by its own terms ended in February of 2005. They at that time should have left the property. Not only did they not leave the property, they expanded their use of the property beyond what they were contractually entitled to at that point in time.

That is the problem here.

We are not talking about a tenant, because they are not a tenant. We are talking about an entity that is occupying property and they have no right to do so.

THE COURT: I assume the city was well aware of this circumstance all during this period of time.

MR. MENENDEZ: Yes, and the city has tried to discuss with Tri-State relating to their occupancy of this property, relating to a fair fee with respect to the property. But Tri-State wants to stay with the deal that they had with CP, which was not a deal that they had with the city.

It is important to note that that ancillary agreement, the city was not a signatory to that ancillary agreement.

THE COURT: I assume the city was aware of that agreement and the city did not disapprove of that agreement.

MR. MENENDEZ: No, because the city knew that that ancillary agreement was subject to the operating agreement that CP had. The language is clear. It is in both agreements.

So the city knew if that operating agreement was ever extinguished, that ancillary agreement in and of itself would be extinguished, because it clearly states that it is subject to the terms of the operating agreement between the city and CP.

THE COURT: So in what way does the city provide rail access if the plaintiff is evicted from the property?

MR. MENENDEZ: The issue of rail access deals with New York & Atlantic as the servicing railroad, not Tri-State.

They have tried to throw themselves and create preemption by association with New York & Atlantic here. They

are not a common carrier. They never were a common carrier. Their whole basis for attempting to get an injunction here is based on their common carrier status, because they are providing transportation subject to the jurisdiction of the board. That is the only way they get preemption. That is the only way that this court would be able to issue an injunction to say we can't proceed at the state court to evict them.

There is simply no facts here which establish that they are a common carrier sufficient enough that is subject to the jurisdiction of the Surface Transportation Board.

THE COURT: What do you say is the city's obligation?

MR. MENENDEZ: Pardon me, your Honor?

THE COURT: What do you say is the city's obligation with regard to providing --

MR. MENENDEZ: Exactly what it is doing, your Honor, it is providing access.

THE COURT: To whom?

MR. MENENDEZ: For New York & Atlantic to service the yard.

THE COURT: The yard is not what is being serviced.

MR. MENENDEZ: Correct.

THE COURT: Who are you providing them access to service if you have no one there that they are servicing?

MR. MENENDEZ: Eventually we will have people there. Right now the city has sent out a request for proposal to set

up rail service in the yard. They are working at negotiating with New York & Atlantic, and the declaration is going to be submitted, that is the original, that will demonstrate that they are negotiating with New York & Atlantic.

The city wants to get its ducks in a row. It wants to first establish an operating agreement. Then it wants to move forward and fill the yard. It shouldn't be required as a land owner here to be force fed an entity that shouldn't be on the property at rates that it didn't agree to.

That is really the issue here. They shouldn't be on the property. The city had the right to develop the rail yard as it sees fit relating to establishing an operator and then moving forward with putting in individuals, tenants, or whatever that may be serviced by that operator.

The fact that Tri-State had an agreement with Canadian Pacific relating to an ancillary agreement, subject to an operating agreement, which has extinguished, by the way, does not now give it the right to stay there, expand its use of the property, and it hasn't paid rent since October of 2004, and then basically when the city sends out this RFP and wants to establish rail service, they are saying, well, we get to stay here and we get to stay here as long as we want and you have to take us.

THE COURT: What steps has the city taken at this point to remove them from the property?

MR. MENENDEZ: The city started to begin an action in state court to evict them from the property, and then this complaint was filed for injunctive relief to stop them from doing that. So at this point we haven't moved forward pending the outcome of this hearing.

THE COURT: When you say you haven't moved forward, have you filed an action in a court at this point? What have you done?

MS. KOENIG: We served a notice to quit, your Honor, and within that 30-day period which we gave them to leave, because they have a lot of bricks there and everything, we gave them as much time as possible. Then they filed this preliminary injunction. Although there was no stay, we felt that it would be improper while this was pending before the court to go ahead in the state court.

THE COURT: So your intention is what? You served them the notice to quit and then your intention is to do what?

MS. KOENIG: File a summons and complaint to evict them from the property in state court.

THE COURT: File that where? In Supreme Court, in the State Supreme Court?

MS. KOENIG: Yes.

MR. MENENDEZ: It would be in the Supreme Court.

MS. KOENIG: I don't want to call them landlord-tenant because they are not a tenant, but that is all this boils down

to.

The bottom line is, they are paying 19 cents a square foot and they don't want to leave, and that is the bottom line. We have been getting, as the papers indicate, 2.25 per square foot. And you can't blame them. 19 cents is a great deal.

THE COURT: OK.

MR. MENENDEZ: So basically, your Honor, if I could wrap it up very quickly, we believe that there is no jurisdiction here for the Surface Transportation Board. We believe the *Hightech* case which we cited is very on point with respect to the issues here.

There is no preemption. This belongs in state court. This is an issue between a landlord and an individual tenant here. Although we argue they are not a tenant, they agreed to a contract. It is expired. They argue irreparable harm, but this is self-inflicted. They knew they would have to be out February 2005. This is something they agreed to themselves. This is something that is not new to them. They were aware it was going to happen.

They failed to abide by their contract. They are really using jurisdiction as a preemptive cloak to avoid or attempt to avoid their obligations under their contract, and the STP in a number of cases has stated that that is not proper. Particularly, it is the *CSX* case which we cited in our papers.

One more thing. With respect to the *Green Mountain* case that the plaintiffs had cited, that involved a railroad and the construction of track, which is totally different because you had a common carrier there and you were talking about constructing track, which is why there was jurisdiction at the Board.

Thank you, your Honor.

MR. McHUGH: May I, your Honor?

THE COURT: Yes, Mr. McHugh.

MR. McHUGH: The *Green Mountain* case involved the construction of a facility which included track as well as silos to hold various commodities, and the issue was whether the State of Vermont can bar the railroad from building those facilities within an area that was protected under local environmental laws.

The silos were the issue, not the track.

They say that the agreement has expired, which is correct. However, Section 49, U.S. Code, 11101 specifically states in (a) that commitments which deprive a carrier of the ability to respond to reasonable requests for common carrier service are not reasonable.

A contract with a railroad, with an expiration date which would allow us, which would force it to terminate its common carrier services is simply not valid.

THE COURT: That also raises an issue of standing.

Maybe you can tell me, but my understanding is that those are rights that are usually asserted by the common carrier. They are not rights asserted by the common carrier's customers.

You want to assert as a common carrier customer those rights that you say are provided to the common carrier when I don't have the common carrier here as a plaintiff.

MR. McHUGH: Your Honor, that is not correct. Under the *Lonestar* case, a customer of a common carrier has a federal right to service. That federal right to service, essentially this is an enforceable agreement. Basically, this clause here is what a customer can enforce. A customer is entitled to service, and if a railroad enters into an agreement --

THE COURT: Enforce it against whom?

MR. McHUGH: It can demand service from the railroad.

THE COURT: Right from the common carrier.

MR. McHUGH: It can demand it from the common carrier.

THE COURT: Do you have any case where the customer has demanded to enforce rights against some other entity other than the common carrier?

MR. McHUGH: I have no case that has that as the law of the case. I have case law in the *Orange County* case that says that a land owner cannot obstruct.

There are cases where a land owner cannot unilaterally under state law revoke a railroad's right, and the most important case is right here. It is the *New York Cross Harbor*

case, which EDC was the plaintiff, where the EDC attempted to evict, basically to adversely abandon the New York Cross Harbor Railroad because its lease had expired and it was a bad actor.

The Surface Transportation Board granted them the approval of that, but the D.C. Circuit reversed that saying that you cannot adversely abandon a railroad that has active service.

THE COURT: But they are enforcing the rights of the railroad.

MR. McHUGH: Enforcing the rights of the railroad.

THE COURT: Not the railroad's customer.

MR. McHUGH: But a customer under the Interstate Commerce Act, under the ICC Termination Act, has the right to demand service from the railroad. Now, here the railroad is not denying us service. It is the City of New York that is trying to force us off this land. Under the *Orange County* case, they do not have the right to do it. They have no right to obstruct the service being provided by the common carrier and they agree they are allowing New York & Atlantic on the property. Allowing New York & Atlantic on the property is about as useful as my kids' train set in the basement. It does not serve the public. You have to be able to get to that service, and the city cannot bar the door, which is what it is trying to do here.

Now, this is the right of the customer to demand

service. Now, the common carrier argument here, yes, Transportation, the second company here, does have some of the indicia, actually, all the indicia of a common carrier, but we are not here as a common carrier. That confusion we get out of this case.

We are customers of a common carrier who are entitled to access to rail transportation. Without that rail transportation, my client's business is essentially over.

They are bringing brick in from, in some cases, Washington State. On average, the brick travels a thousand miles. It is loaded in the heaviest cars there are, and essentially there isn't even trucking capacity right now, according to Mr. Turzilli and Mr. Galligan, to replace that with anything else.

The city simply says that we are paying 19 cents when we should be paying 2.25. That dispute has to go to the Surface Transportation Board. Right now we have tendered the rent that would be due with escalation clauses under the existing agreements.

THE COURT: Why is that a dispute that goes to the Surface Transportation Board? None of the cases that you cite are a dispute over the amount of fees to be charged by the landlord.

The Surface Transportation Board, in my understanding, doesn't regulate the amount of fees to be charged by a land

owner to a person who wants to occupy or occupy those premises.

You're saying the Surface Transportation Board would set the price of the occupancy of your client with regard to occupying the space?

MR. McHUGH: Yes, your Honor.

Let me hand up the decision, 109, in *CSX Corporation*, etc., etc. It is the acquisition of the Conrail assets by Norfolk, Suffolk, and CSX. This is the decision where the Surface Transportation Board basically started the process of setting the price that the Canadian Pacific Railroad had to pay for use of facilities east of the Hudson in the New York City area.

Footnote 17 tells us what the formula is. But the Surface Transportation Board, in the absence of an agreement between the parties, is the last arbiter of how much anybody using transportation assets must pay for that use, and that the board has the facility to do it. Its formula is in footnote 17. This case to some extent tells you how it goes about doing it, but it does in fact set the rates to be paid.

THE COURT: It sets the rates to be paid between whom?

MR. McHUGH: Between any owner of railroad land and any user of railroad land. It doesn't matter whether the owner is a common carrier or not. They have devoted their land to common carrier use.

The STB, absent an agreement, will set those prices

and has for years.

THE COURT: When you say "absent an agreement," what do you mean by that?

MR. McHUGH: If the parties can reach an agreement, fine.

THE COURT: So why do you say that simply because you say that you refuse to pay what they want, that that means the Surface Transportation Board is supposed to set the fee between the city and the customer of the common carrier.

MR. McHUGH: Yes. A fee dispute cannot stop common carriage. They can't block access because of a fee dispute. However, they are entitled to go back to the Surface Transportation Board immediately or in the future and ask the board to set the fee from the date the agreement started. We are perfectly willing to do that.

THE COURT: Again, that is a separate dispute. That is a dispute about fees.

MR. McHUGH: It is a dispute about the terms of access.

THE COURT: No, it is a dispute about how much are you going to pay for the access.

MR. McHUGH: That is part of the terms of access. How your trucks are going to get in is one dispute here.

THE COURT: There is no dispute here about how the trucks are going to get in or not. The dispute is over how

much money you are going to pay.

MR. McHUGH: There is only one way in, so there can't be a dispute about that.

THE COURT: There is a dispute about you want to pay a little, they want you to pay a lot. That is the dispute.

MR. McHUGH: The little that we want to pay is based upon the agreement with CP, which is based upon CP's operating agreement with the city.

THE COURT: Which doesn't exist anymore, so you don't have any right to the terms of that agreement.

MR. McHUGH: The agreement does not not exist.

THE COURT: It has expired. There is not a little bit or a lot, it either is or it isn't.

MR. McHUGH: It has expired by its terms.

Our position is, under 11101, that termination date is unreasonable because it cripples the Canadian Pacific from fulfilling its common carrier obligations. Once you become a common carrier in this country, you cannot stop until the --

THE COURT: That is not the question. The question isn't whether you can stop. The question is whether you get to pay exactly what you were paying before.

MR. McHUGH: Of course, there is an escalator in the agreement and the STB can consider all this. But the fact of the matter is, the STB values railroad lands based upon the going-concern value of the railroad, not based upon what a city

contractor -- it is amazing. They are using a city contractor as their example. He has a cost plus contract. He doesn't care how much he pays. Basically, that money is coming from the Street Department and going into the EDC's department.

Again, it is not even a commercially reasonable deal that we can compare it with.

The other one is a manufacturer -- basically, a person who puts automobiles together when they come off the boat. Again, that is a manufacturing function, it isn't a railroad function.

The STB determines these rates based upon railroad function, and these lands have been railroad lands since, according to Mr. Galligan, 1970. It isn't as if the city just bought them on the market two weeks ago.

THE COURT: All right. Suppose I just assume for these purposes that you could demonstrate everything that you have just indicated. Where is your irreparable harm?

Even if you were entitled to a permanent injunction, why at this point are you entitled to a preliminary injunction when you can't -- they can't get you out until they succeed in a state court action? Where is the imminent irreparable harm at this point?

MR. McHUGH: Of course, they have to go into the state court action. It is a pall over my client's reputation.

THE COURT: But a pall over your client's reputation

never constitutes irreparable injury.

MR. McHUGH: Yes, it is, because it is your business reputation is at stake here.

THE COURT: How is its business reputation at stake? You're saying they are the bad guys. They haven't said you are the bad guys. They are just simply saying that you are there and they want you out, and unless you pay them more money, you have to move. That doesn't make you bad people, that just makes you good business people.

MR. McHUGH: First of all, without this property there is no place else to go.

THE COURT: But nobody has kicked you off the property yet.

MR. McHUGH: Not yet.

THE COURT: And you are not imminently being kicked off the property tomorrow. They can't get you off the property unless they succeed on all of the arguments that they are making to withstand this motion in a state court.

MR. McHUGH: Essentially that is true, except that the state court doesn't have jurisdiction. You do. And the Surface Transportation Board has --

THE COURT: You can convince the state that they don't have jurisdiction, can't you?

MR. McHUGH: Then we are back here.

THE COURT: That is true, but that doesn't make it

irreparable injury. That means when you come back here that I can consider giving you the same relief that you are asking for now and nothing terrible has happened in the meantime.

MR. McHUGH: The only terrible thing that happens is as long as there is a cloud over their right to be there, their ability to tell their customers that they order parts for buildings based on the schedule for that building, and a building is not built over night. They are built over periods of a year or two. So when they are going out and bidding on contracts for things that are to be due a year from now or a year and a half from now, they can't do it if they do not know that they are going to be in business a year from now.

THE COURT: Even granting you a preliminary injunction is not going to be a guarantee that they are going to be in business a year from now. There is no determination on the merits, ultimate merits of this case, and it is obviously possible that you could get a preliminary injunction and then not succeed ultimately in this litigation. There is still a cloud over that and that will have to be considered.

MR. McHUGH: A preliminary injunction in this court would be a determination that the clients, my clients, have a high probability of success on the merits. That is a major selling point in telling people you are going to be here next year.

Further, the case law that we have cited is pretty

firm that my clients are right on the merits, and that is also a selling point. So essentially, the preliminary injunction is necessary to keep them from putting a cloud on title, which is going to make it very difficult, if not impossible, for my client to basically sell on contracts that are due up to a year from now because that is when the construction schedules are.

You cannot in good faith go out and sell stuff that you cannot deliver.

THE COURT: So what. You are talking about construction on the site. You haven't necessarily convinced me that your client, even with regard to the rights that you are saying that your client is entitled to, your client is entitled to further construction on this site.

Under what terms is your client entitled to any of that even if you were to win on this case?

MR. McHUGH: Your Honor, we are not asking you to construct anything on the site. There is nothing needed on the site.

THE COURT: That is what you just argued.

MR. McHUGH: I am sorry for the confusion.

My client sells brick and stone to the construction industry. The construction industry orders brick and stone for delivery in the future based upon construction contracts. For instance, a school contract. It could take two years to build a school or from the time you get to a contract to the time you

need the brick. But you have to order the brick and arrange for its delivery at a date certain in the future.

Now my client's reputation is staked upon the fact it signs a contract today and 18 months from today on the money that brick is delivered to the site in Brooklyn for pickup by the construction company for its use.

If we have a cloud on our right to be there which gets past this motion, if we are not found by this court to have a high probability of success on the merits, then the industry is going to look at that and not choose to patronize my client.

THE COURT: What do you have other than your speculation on that point? What evidence have you put before the court that that is any reasonable expectation other than your speculating in the abstract that that is the case?

MR. McHUGH: If you look at Mr. Turzilli's affidavit, he goes through this, that essentially their reputation is based on delivery of these products on time and any threat to that is a cloud on their reputation.

THE COURT: His saying it doesn't make it any more real than your saying it. Anybody can speculate as to that. Is there any evidence whatsoever that indicates that your client is being irreparably harmed because your client has what is an unavoidable genuine dispute that exists?

MR. McHUGH: Your Honor, I think you have pretty much defined exactly what irreparable harm is. We cannot put our

finger on it because it is impossible to define it precisely. That is what irreparable harm is.

THE COURT: That is not what irreparable harm is because there is some pretty clear irreparable harm that I can see every day that people can put their finger on and define and that is why they very quickly succeed on asking for a preliminary injunction.

MR. McHUGH: In the case of *Canadian International v. the City of Rockford* that we cite, it is the inability to sell your business, sell your product to future customers is held to be irreparable harm in a case involving a railroad terminal similar to this. That case is cited. Unfortunately, we still have the Westlaw cite on that, but that is a very recent case. I guess that was back in June or July. That was out of Michigan.

There we had a railroad terminal that the city wanted to shut down. The court there held that the loss, potential loss of customers in the future and the damage to the reputation caused by the shutdown was irreparable harm.

THE COURT: At this point, isn't the only possible consequence of that is that if your client cannot reach an agreement on the amount of use and the fees for use and occupancy of this site, if your client is not willing to pay what they are willing to charge, then your client will make a decision to move? Isn't that really the only consequence of

this controversy at this point?

MR. McHUGH: My client can't make a decision to move, your Honor, because there is no other facility available in the entire region.

THE COURT: Doesn't that mean that they will either have to make a decision to pay what they want or they are going to have to demonstrate that your client doesn't have the obligation to pay what they want?

MR. McHUGH: The difficulty we have, your Honor, is that the defendants are seeking an unreasonable amount of money under the terms of the ICC Act.

THE COURT: If you demonstrate that that is an unreasonable amount of money, then your client won't have to pay it.

MR. McHUGH: That is correct. What we are saying is the Surface Transportation Board has to do that. We are saying that everything we are talking about here has to be before the Surface Transportation Board, not the Supreme Court of New York. And nobody went to the Surface Transportation Board to seek the type of relief the city wants.

If they want more money than the agreement that we had with CP provides for, they have the right to go ask the Surface Transportation Board to hear it and set the rate, and they haven't done it. They did not go to the Surface Transportation Board to seek to abandon the service. They haven't done it.

Our position here is, they have a remedy available to them, which they did not use, and there is no other remedy that they can use. So what they are trying to do is patently illegal. Therefore, we should have relief in the interim, because what they are trying to do is to destroy our business either by accident or deliberately. The effect is the same. We are irreparably harmed because we have no alternative to this site and we cannot use it on their terms and stay in business, and that is irreparable harm.

I think we have met the terms of irreparable harm on this motion. We believe we also have a high probability of success on the merits and, therefore, the burden on irreparable harm is reduced in this Circuit based on that.

This Circuit has held exactly the same as in Michigan, that where you have a unique product, which my client has, which must be delivered on a timely fashion, on a regular basis, the threat to being able to do that is irreparable harm. So we believe we have met the standards necessary for the preliminary injunction and a permanent injunction.

Thank you, your Honor.

MR. MENENDEZ: If I may, your Honor.

THE COURT: Sure.

MR. MENENDEZ: Very quickly.

Your Honor, there are a couple of points. First, it is clear here that there is no denying accession to the common

carrier. I just wanted to make clear that the common carrier is not Tri-State. There is no jurisdiction from the Board here. He cites 11101 with respect to an access case. This isn't an access case that deals with railroad access by a common carrier. That would be analogous to Tri-State going off to New York & Atlantic to provide access. So 11101 does not provide here to the land owner, and there are no cases he cited that support that.

Next, the case that he has handed forward, the *CSX* case, deals with fee rates between railroads. We are not dealing with railroads here. The Surface Transportation Board has made it clear that they do have jurisdiction over dealing with that because they don't want fee disputes to stop trains from moving one place to the other. It is very important in interstate commerce. That is the whole purpose of it.

That is a fee dispute that should be at the board. This is a fee dispute between a prospective tenant and a land owner. The *Hightech* case makes it very clear. They say, if we extend jurisdiction to not only railroads and common carriers but to those who use the services of railroads, that is a very slippery slope. Where do we stop? Do the truck companies that then also use these people get to go to the Surface Transportation Board? I don't think Congress intended for preemption to go that far, because then the Surface Transportation Board would be inundated to determining rates

with respect to landlord-and-tenant issues with respect to rail yards, to truck fees, because they potentially could interfere with the flow of interstate commerce.

It really is limited to whether or not there is a common carrier here that is subject to the jurisdiction of the board, and there simply isn't. If there isn't, there is no basis for an injunction here because there is no preemptive effect as to federal law.

This should be in state court because it is an issue that involves a land owner who has property and an entity that is holding over beyond the terms of the contract. They keep talking about irreparable harm and that their business is going to go off. Well, they agreed to these terms. In February of 2005 they were going to be out of there anyway. They didn't put anything in the ancillary agreement to talk about staying there beyond those terms. They shouldn't have the right to stay there just because they are in a rail yard. They also have to be a common carrier.

The transportation by a common carrier is not transportation to a common carrier. That is what we have here. The *Hightech* case controls this case. The board at the Surface Transportation Board level ruled at the same time the Third Circuit ruled, and they came out with the same issue. That is why we are not at the Board. They say we could have gone to the Board. They could have filed this with the Board. They

could have gone down to the Board. But they know at the Board there is no jurisdiction because the *Hightech* case has taken care of this issue, and they are a trans-load operation. They are not a common carrier. They don't move freight cars. They don't move locomotives. They don't do anything of that by their own admission. They load brick and unload brick and they move it to trucks, and simply under the *Hightech* case that calls for no preemption and no exclusive jurisdiction.

Thank you, your Honor.

MR. McHUGH: Your Honor, one quick comment.

THE COURT: Sure.

MR. McHUGH: *Hightech* case has nothing to do with this. *Hightech* was claiming to be a common carrier and therefore exempt from the licensing authority of the State of New Jersey. It was found otherwise.

As we cite in our brief, there is a case involving EDC involving the railroad line on Staten Island which held that EDC, not a rail carrier, was within the Board's jurisdiction, but it was building facilities to be used by railroads. Here it admits it is building facilities to be used by railroads. It is saying here it does not want to obstruct New York & Atlantic's use of the facilities. It is in the same position here as it was on Staten Island. Here it is denying jurisdiction and there it got jurisdiction. The fact of the matter is the case is the same.

The EDC with regard to its railroad operating facilities is subject to the Board's jurisdiction.

Thank you, your Honor.

THE COURT: At this point I am going to deny the request for preliminary injunction. I think on this record that the plaintiff has neither demonstrated the likelihood of success on the merits nor, and more importantly, the irreparable injury that is required here.

I will deny it without prejudice to the plaintiff attempting to demonstrate that it would be entitled to ultimately a permanent injunction in this case. But at this stage I can't find, primarily can't find that simply the cloud over the future of the use of the rail yard, which, quite frankly, doesn't go away simply because a preliminary injunction is issued, although obviously it could affect people's judgment with regard to that. The general dispute still is the dispute over the amount of fees to be charged for use of this yard, and that dispute will ultimately have to be resolved.

If the city determines that it will proceed with a state court lawsuit in order to attempt to evict plaintiff from these premises, obviously if the plaintiff can demonstrate that there is an imminent threat of having to terminate business at the rail yard and being evicted from the rail yard, and they can demonstrate that it is beyond the authority of the state

court to issue such a determination, if it has not convinced the state court that it is beyond its authority, then based on a more complete record with regard to the likelihood of success and/or the irreparable injury, the application for a preliminary injunction can still move forward to demonstrate that the plaintiff is entitled to a permanent injunction, and the application can be renewed at that time for preliminary injunction to stop the imminent eviction of the plaintiff from the premises if it can be demonstrated.

With regard to whether or not the Surface Transportation Board has authority over this dispute, I also agree that the plaintiff as well as the defendant has a reasonable opportunity to demonstrate to this court by going to the Surface Transportation Board and urging the Surface Transportation Board to assert authority over this dispute and demonstrate that it is in the Surface Transportation Board's jurisdiction to review this issue before any further action can be taken. Thereafter if some other similar evidence could be presented to this court, obviously that would be significant or compelling with regard to whether or not a preliminary injunction would issue.

But given the status of the dispute at this point in time and given the nature of the issue as has been articulated with regard to the legal issues that are ultimately in dispute either here or in state court between the parties, I cannot

determine that the plaintiff has met its burden at this stage of the proceeding to demonstrate a likelihood of success, that it will ultimately demonstrate that the city cannot ultimately either seek a substantially higher fee or evict or remove the plaintiff from the premises without presenting such a proposal to the Surface Transportation Board.

Even if that were the case, I believe that the plaintiff has not at this stage demonstrated a sufficient basis for finding irreparable harm since it has only been given a notice to remove from the premises. That state court action has not even been issued yet with regard to that.

As plaintiff has articulated, the cloud over plaintiff with regard to this outstanding dispute is not a sufficient basis for this court to determine that that in and of itself creates irreparable injury without the issuance of a preliminary injunction at this stage, given the nature of the dispute and the lack of a demonstration that the plaintiff will ultimately be successful on the merits, convincing either the state court, the Surface Transportation Board or this court that the city cannot either renegotiate or negotiate a higher use of occupancy fee with regard to the use and access to these premises or, if not, that it cannot obtain use and reassert its right to utilize the space for other transportation services with other customers who are willing to utilize the space in a manner and at such fee that the city believes is reasonable to

anticipate given the market with regard to these services.

So at this point I believe that the plaintiff has not demonstrated either a likelihood of success or irreparable injury.

I will deny the application for preliminary injunction without prejudice to an ultimate opportunity to demonstrate that a permanent injunction is appropriate or an opportunity to renew the application for preliminary injunction if the progress of this dispute demonstrates that there is some imminent irreparable injury that would be caused by the defendant and a showing that there is a likelihood of success on the merits that the Surface Transportation Board would have authority and assert authority over this dispute before the city can take any further action with regard to attempting to remove the plaintiff from the premises.

So I deny the application without prejudice.

I will let the parties either move forward with further discovery on this issue, if that is appropriate, or to see what the progress is in the state court, if some action is initiated before the Surface Transportation Board to see if there are any developments that would affect the plaintiff's right to obtain a preliminary injunction at this stage of this dispute in this litigation between the parties.

I will issue an order denying the application based on the record that I just made without prejudice, as I said, to

the plaintiffs moving forward.

This record will serve as the court's findings and reasons with regard to the denial of the motion for preliminary injunction.

(Adjourned)